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ANNEX

ANNEX

THE

OPINIONS

OF

DIFFERENT AUTHORS

UPON THE

PUNISHMENT OF DEATH,

SELECTED

BY

BASIL MONTAGU, ESQ.

OF LINCOLNS INN.

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ГДВКУВА
ЬЛВПС
ЖЕЛ АСЫ

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PREFACE.

In examining the opinions of different authors upon capital punishments, various questions present themselves to our consideration.

1. Upon what principle is the punishment of death inflicted?

2. Upon what authority is the punishment of death inflicted?

3. What are the effects of the punishment of death?

4. What are the sentiments of eminent men?

5. What are the laws of other countries?

6. Supposing the punishment of death to be expedient, for what offences ought it to be inflicted?

7. Supposing the punishment of death not to be expedient, can any, and what remedies, be suggested?

of the body, *præstat cautela, quam medela:* and it is a certain rule, that, *videbis ea sæpe committi, quæ sæpe vindicantur*; those offences are often committed, that are often punished: for the frequency of the punishment makes it so familiar, as it is not feared. For example, what a lamentable case is it to see so many christian men and women strangled on that cursed tree of the gallows, insomuch, as if in a large field a man might see together all the christians that, but in one year, throughout England, come to that untimely and ignominious death, if there were any spark of grace, or charity in him, it would make his heart to bleed for pity and compassion.

"But the consideration of this preventing justice were worthy of the wisdom of parliament, and in the mean time expert and wise men to make preparation for the same, as the text saith, *ut benedicat eis Dominus.* Blessed shall he be that layeth the first stone of the building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our King and nation."

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" Men have entered into a desire of learning and knowledge, sometimes upon a natural curiosity and inquisitive appetite : sometimes to entertain their minds with variety and delight : sometimes for ornament and reputation : and sometimes to enable them to victory of wit and contradiction : and most times for lucre and profession ; but seldom sincerely to give a true account of their gift of reason for the benefit and use of man :—as if there were sought in knowledge a couch, whereupon to rest a searching and restless spirit : or a terrace for a wandering and variable mind to walk up and down with a fair prospect : or a tower of state for a proud mind to raise itself upon : or a fort or commanding ground for strife and contention : or a shop for profit and sale : and not a rich store house for the glory of the Creator, and the relief of man's estate."

BACON.

DR. JOHNSON.

Published in the Year 1751.

——————————— *Audi*
Nulla unquam de morte hominis cunctatio longa est. JUVENAL.

—— When man's life is in debate,
The Judge can ne'er too long deliberate. DRYDEN.

POWER and superiority are so flattering and delightful, that fraught with temptation and exposed to danger as they are, scarcely any virtue is so cautious, or any prudence so timorous, as to decline them. Even those that have most reverence for the laws of right, are pleased with shewing that not fear, but choice regulates their behaviour; and would be thought to comply rather than obey. We love to overlook the boundaries which we do not wish to pass; and as the Roman Satirist remarks, he that has no design to take the life of another, is yet glad to have it in his hands.

From the same principle, tending yet more to degeneracy and corruption, proceeds the desire of investing lawful authority with terror, and governing by force rather than persuasion.

Pride is unwilling to believe the necessity of assigning any other reason than her own will; and would rather maintain the most equitable claims by violence and penalties, than descend from the dignity of command, to dispute and expostulation.

It may, I think, be suspected, that this political arrogance has sometimes found its way into legislative assemblies, and mingled with deliberations upon property and life. A slight perusal of the laws by which the measures of vindictive and coercive justice are established, will discover so many disproportions between crimes and punishments, such capricious distinctions of guilt, and such confusion of remissness and severity, as can scarcely be believed to have been produced by public wisdom, sincerely and calmly studious of public happiness.

The learned, the judicious, the pious Boerhaave relates, that he never saw a criminal dragged to execution without asking himself, "Who knows whether this man is not less culpable than me?" On the days when the prisons of this city are emptied into the grave, let every spectator of the dreadful procession put the same question to his own heart. Few among those that croud in thousands to the legal massacre, and look with carelessness, perhaps with triumph, on the utmost exacerbations of human misery, would then be able to return without horror and dejection. For, who can congratulate himself upon a life passed without some act more mischievous to the peace or prosperity of others than the theft of a piece of money?

It has always been the practice, when any particular species of robbery becomes prevalent and common, to endeavour its suppression by capital denunciations. Thus, one generation of malefactors is commonly cut off, and their successors are

frighted into new expedients; the art of thieving is augmented by a greater variety of fraud, and subtilized to higher degrees of dexterity, and more occult methods of conveyance. The law then renews the pursuit in the heat of anger, and overtakes the offender again with death. By this practice, capital inflictions are multiplied, and crimes, very different in their degrees of enormity, are equally subjected to the severest punishment that man has the power of exercising upon man.

The lawgiver is undoubtedly allowed to estimate the malignity of an offence, not merely by the loss or pain which single acts may produce, but by the general alarm and anxiety arising from the fear of mischief and insecurity of possession: he therefore exercises the right which societies are supposed to have over the lives of those that compose them, not simply to punish a transgression, but to maintain order and preserve quiet; he enforces those laws with severity that are most in danger of violation, as the commander of a garrison doubles the guard on that side which is threatened by the enemy.

This method has been long tried, but tried with so little success, that rapine and violence are hourly encreasing: yet few seem willing to despair of its efficacy, and of those who employ their speculations upon the present corruptions of the people, some propose the introduction of more horrid, and lingering, terrific punishments; some are inclined to accelerate the executions; some to discourage pardons; and all seem to think that lenity has given confidence to wickedness, and that we can only be rescued from the talons of robbery, by inflexible rigour and sanguinary justice.

Yet since the right of setting an uncertain and arbitrary value upon life has been disputed, and since experience of past times gives us little reason to hope that any reformation will be

effected by a periodical havoc of our fellow-beings, perhaps it will not be useless to consider what consequences might arise from relaxations of the law, and a more rational and equitable adaptation of penalties to offences.

Death is, as one of the ancients observes, *of dreadful things the most dreadful;* an evil, beyond which nothing can be threatened by sublunary power, or feared from human enmity or vengeance. This terror should, therefore, be reserved as the last resort of authority, as the strongest and most operative of prohibitory sanctions, and placed before the treasure of life, to guard from invasion what cannot be restored. To equal robbery with murder, is to reduce murder to robbery; to confound in common minds the gradations of iniquity, and incite the commission of a greater crime to prevent the detection of a less. If only murder were punished with death, very few robbers would stain their hands in blood; but when, by the last act of cruelty, no new danger is incurred, and greater security may be obtained, upon what principle shall we bid them forbear?

It may be urged, that the sentence is often mitigated to simple robbery; but surely this is to confess that our laws are unreasonable in our own opinion; and indeed it may be observed, that all but murderers have, at their last hour, the common sensations of mankind pleading in their favour.

From this conviction of the inequality of the punishment to the offence, proceeds the frequent solicitation of pardons. They who would rejoice at the correction of a thief, are yet shocked at the thought of destroying him. His crime shrinks to nothing compared with his misery; and severity defeats itself by exciting pity.

The gibbet, indeed, certainly disables those who die upon it from infesting the community; but their death seems not to

contribute more to the reformation of their associates, than any other method of separation. A thief seldom passes much of his time in recollection or anticipation, but from robbery hastens to riot, and from riot to robbery; nor when the grave closes upon his companion, has any other care than to find another.

The frequency of capital punishments, therefore, rarely hinders the commission of a crime, but naturally and commonly prevents its detection; and is, if we proceed only upon prudential principles, chiefly for that reason to be avoided. Whatever may be urged by casuists and politicians (the greater part of mankind) as they can never think that to pick the pocket and to pierce the heart is equally criminal, will scarcely believe that two malefactors so different in guilt can be justly doomed to the same punishment; nor is the necessity of submitting the conscience to human laws so plainly evinced, so clearly stated, or so generally allowed, but that the pious, the tender, and the just, will always scruple to concur with the community in an act which their private judgment cannot approve.

He who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten, for fear of hurrying the offender to that state in which there is no repentance, has conversed very little with mankind. And, whatever epithets of reproach or contempt this compassion may incur from those who confound cruelty with firmness, I know not whether any wise man would wish it less powerful or less extensive.

If those, whom the wisdom of our laws have condemned to die, had been detected in their rudiments of robbery, they might, by proper discipline and useful labour, have been disentangled from their habits; they might have escaped all the temptations to subsequent crimes, and passed their days in reparation and penitence; and detected they might all have been, had the prosecutors been certain that their lives would have been spared.

I believe every thief will confess, that he has been more than once seized, and dismissed; and that he has sometimes ventured upon capital crimes, because he knew, that those whom he injured would rather connive at his escape, than cloud their minds with the horrors of his death.

All laws against wickedness are ineffectual, unless some will inform, and some will prosecute; but till we mitigate the penalties for mere violations of property, information will always be hated, and prosecution dreaded. The heart of a good man cannot but recoil at the thought of punishing a slight injury with death; especially when he remembers, that the thief might have procured safety by another crime, from which he was restrained only by his remaining virtue*.

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* About five years since, the county of York were deeply interested in the trial of the father of a large family, who, when living in the greatest respectability, was accused of highway robbery.

The trial was in York Castle; the prosecutor was a youth of about 20 years of age, the son of a banker, and the prisoner a stout athletic man, of 50.

The prosecutor had transacted his business as usual at the Market-town; he had received several sums of money in the presence of the prisoner; had dined, and about five o'clock had set out on his return home: it was a fine evening in summer, and he rode gently on: in a solitary lane he was overtaken by the prisoner, who seized him and demanded his pocket-book: in the first agony of surprise and fear, the prosecutor gave him a violent blow with his whip; but the prisoner, who was a very powerful man, dragged him from his horse, knelt down upon him, and took from him his money and account books. In this situation the prosecutor begged very earnestly for his life. As he laid under the prisoner, he watched his countenance, and saw that he was much agitated; he desisted, arose, mounted his horse, and rode away. It was then about seven o'clock in the evening; but the young man was so much exhausted, that he did not reach home till late at night. He immediately stated these circumstances; but the improbability of his having been robbed in open day-light, on a public road, and of his having lost various memorandums, which a robber would scarcely have taken, excited some suspicion respecting the truth of this statement.

The obligations to assist the exercise of public justice are indeed strong; but they will certainly be overpowered by tenderness for life. What is punished with severity contrary to our ideas of adequate retribution, will be seldom discovered; and multitudes will be suffered to advance from crime to crime till they deserve death, because, if they had been sooner prosecuted, they would have suffered death before they had deserved it.

This scheme of invigorating the laws by relaxation, and extirpating wickedness by lenity, is so remote from common practice, that I might reasonably fear to expose it to the public, could it be supported only by my own observations: I shall therefore, by ascribing it to its author, Sir Thomas More,

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"As the Jury were leaving the Box, the young man who had been robbed begged to be heard. He was so much agitated, that he could scarcely speak; when he recovered himself he said, "I stand here to plead for your mercy towards a man, who listened to my voice when I begged for mercy from him. If he could have been deaf to my cry, I should now be in my grave, and he in the bosom of a respectable family, with the wife who believed him virtuous, and the children who loved him. It has been proved to you that his connections, his character, his religious persuasion, would all have united to shelter him from suspicion; it has also been proved that I was lame from my birth; that I am feeble; that I had exasperated him by a blow which almost fractured his skull; and that he knew I could identify him; but the kindness of his nature preponderated, it overcame the fear of disgrace; and he suffered me to depart, that I might be the cause of his death. If you do not pity his momentary lapse, if you do not respect his return to virtue, it would have been well for me if I had died! It is me that you will condemn, I shall be the victim of the law, and he gave me my life in vain!"

He was frequently interrupted, during this affecting appeal, by the tears of the Jury, and the general distress of the Court.—The prisoner was found Guilty, and was executed.—The story is well known in the county of York. The name is suppressed from respect to his friends.

endeavour to procure it that attention which I wish always paid to prudence, to justice, and to mercy.

Rambler, No. 114, April 20th, 1751.

SIR W. BLACKSTONE.

Published in the Year 1765.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as

are greatly disproportionate to their end, in order to check the progress of some very prevalent offence; from some, or from all, of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own *. But even with us in England, where our crown law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals against whom he can form no exception, nor even a personal dislike;—even here we shall occasionally find room to remark some particulars that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who, upon temporary motives, may prefer or support such a bill; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of; who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice, how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an indivi-

* Baron Montesquieu, Marquis Beccaria, &c.

dual, without first referring it to some of the learned judges, and hearing their report thereon *. And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fish pond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard †. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians ‡.

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those whose abilities and stations enable them to apply the remedy.

As to the power of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnor §, it is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a

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* See Vol. II. p. 345.

† Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.

‡ Stat. 5 Eliz. c. 20.

§ See Grotius, *de j. b. & p. l.* 2. *c.* 20. Puffendorf. L. of Nat. & N. b. 8. c. 3.

state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution; and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him * expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which was one of the evils that civil government was intended to remedy. Whatever power, therefore, individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power, of individuals, must be referred that right which some have argued to belong to every state (though in fact never exercised by any) of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt †.

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions; and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness, therefore, of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which

* Gen. iv. 14. † See Vol. I. page 254.

they entered, when first they engaged in society; it was calc lated for, and has long contributed to, their own security.

This right therefore being thus conferred by universal consen gives to the state exactly the same power, and no more, over i its members, as each individual member had naturally ov himself or others. Which has occasioned some to doubt, ho far a human legislature ought to inflict capital punishments f *positive* offences; offences against the municipal law only, a not against the law of nature; since no individual has natural a power of inflicting death upon himself or others for actio in themselves indifferent. With regard to offences *mala in* capital punishments are in some instances inflicted by the i mediate *command* of God himself to all mankind; as, in t case of murder, by the precept delivered to Noah, their co mon ancestor and representative ‡, "Whoso sheddeth ma blood, by man shall his blood be shed." In other instan they are inflicted after the *example* of the Creator, in his po tive code of laws for the regulation of the Jewish republic; as the case of the crime against nature. But they are sometin inflicted without such express warrant or example, at the w and discretion of the human legislature; as for forgery, for th and sometimes for offences of a lighter kind. Of these we principally to speak: as these crimes are, none of them, offen against natural, but only against social rights; not even th itself, unless it be accompanied with violence to one's house person: all others being an infringement of that right of p perty, which, as we have formerly seen §, owes its origin no the law of nature, but merely to civil society.

The practice of inflicting capital punishments, for offen of human institution, is thus justified by that great and g man, Sir Matthew Hale ‖: "When offences grow enormo

‡ Gen. ix. 6. § Book II. ch. 11. ‖ 1 Hal. P. C.

frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment, and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing law, that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given, that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late Empress Elizabeth, than under her more sanguinary predecessors? Is it now under Catherine II. less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death: and the latter has, upon full persuasion of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions *. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety de-

* Grand instructions for framing a new code of laws for the Russian empire, §. 210.

pend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstrations.

I would not be understood to deny the right of the Legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have doubted it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the law must decide it: and to this public judgment or decision all private judgments must submit, else there is an end of the first principle of all society, and government. The guilt of blood, if any, must lie at their doors who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

Lastly, as a conclusion to the whole, we may observe, that punishments of unreasonable severity, especially when indis-

criminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action †, that crimes are more effectually prevented by the *certainty* than by the *severity* of punishment. For the excessive severity of laws (says Montesquieu ‡) hinders their execution: when the punishment surpasses all measure, the public will frequently, out of humanity, prefer impunity to it. Thus also the statute 1 Mar. st. 1. c. 1. recites, in its preamble, "that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth, without great penalties, are more often obeyed and kept, than laws made with extreme punishments." Happy had it been for the nation, if the subsequent practice of that deluded princess, in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors, severe punishments were revived; and then the empire fell.

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest

† Beccar. c. 7. ‡ Sp. L. b. 6. c. 13.

defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind; yet that man must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed ‡, that, in every state, a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus, in France, the punishment of robbery, either with or without murder, is the same §: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not: hence, in that country, they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which is seldom extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

Yet, though, in this instance, we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent

‡ Beccar. c. 6. § Sp. L. b. 6. c. 16.

statutes, upon crimes very different in their natures. It is a melancholy truth, that, among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared, by act of parliament §, to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

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§ See Ruffhead's index to the statutes, (tit. felony), and the acts which have since been made.

MARQUIS BECCARIA.

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1st. OF THE MILDNESS OF PUNISHMENTS.

The course of my ideas has carried me away from my subject, to the elucidation of which I now return. [*Crimes are more effectually prevented by the certainty, than the severity of punishment.*] Hence in a magistrate, the necessity of vigilance, and in a judge of implacability, which, that it may become an useful virtue, should be joined to a mild legislation. The certainty of a small punishment will make a stronger impression, than the fear of one more severe, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of heaven, hath the power of dispelling the apprehension of a greater; especially if supported by examples of impunity, which weakness or avarice too frequently afford.

If punishments be very severe, men are naturally led to the perpetration of other crimes, to avoid the punishment due to the first. The countries and times most notorious for severity of punishments, were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed; for the hand of the legislator and the assassin were directed by the same spirit of ferocity; which on the throne, dictated laws of iron to slaves and savages, and in private, instigated the subject to sacrifice one tyrant to make room for another.

In proportion as punishments became more cruel, the minds of men, as a fluid rises to the same height as that which surrounds it, grow hardened and insensible; and the force of the passions still continuing, in the space of an hundred years, the *wheel* terrifies no more than formerly the prison. That a punishment may produce the effect required, it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime; including in the calculation, the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical.

Men regulate their conduct by the repeated impression of evils they know, and not by those with which they are unacquainted. Let us, for example, suppose two nations, in one of which the greatest punishment is *perpetual slavery*, and in the other *the wheel*. I say, that both will inspire the same degree of terror; and that there can be no reasons for increasing the punishments of the first; which are not equally valid for augmenting those of the second to more lasting and more ingenious modes of tormenting; and so on, to the most exquisite refinements of a science too well known to tyrants.

There are yet two other consequences of cruel punishments, which counteract the purpose of their institution, which was to prevent crimes. The *first* arises from the impossibility of establishing an exact proportion between the crime and punishment; for though ingenious cruelty hath greatly multiplied the variety of torments, yet the human frame can suffer only to a certain degree, beyond which it is impossible to proceed, be the enormity of the crime ever so great. The *second* consequence is impunity. Human nature is limited no less in evil than in good. Excessive barbarity can never be more than temporary; it being impossible that it should be supported by a permanent system of legislation; for if the laws be too cruel they must be altered, or anarchy and impunity will succeed.

Is it possible, without shuddering with horror, to read in history of the barbarous and useless torments that were coolly invented and executed by men who were called sages? Who does not tremble at the thoughts of thousands of wretches, whom their misery, either caused or tolerated by the laws, which favoured the few and outraged the many, had forced in despair to return to a state of nature; or accused of impossible crimes, the fabric of ignorance and superstition; or guilty only of having been faithful to their own principles; who, I say, can, without horror, think of their being torn to pieces with slow and studied barbarity, by men endowed with the same passions and the same feelings? A delightful spectacle to a fanatic multitude!

2nd. OF THE PUNISHMENT OF DEATH.

The useless profusion of punishments, which as they never made men better, induces me to inquire, whether the punishment of *death* be really just or useful in a well governed state? *What right, I ask, have men to cut the throats of their fellow creatures?* Certainly not that on which the sovereignty and laws are founded. The laws, as I have said before, are only the sum of the smallest portions of the private liberty of each individual, and represent the general will, which is the aggregate of that of each individual. Did any one ever give to others the right of taking away his life? Is it possible, that in the smallest portions of the liberty of each, sacrificed to the good of the public, can be contained the greatest of all good, life? If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself? Which he certainly must have, if he could give it away to another.

But the punishment of death is not authorised by any right; for I have demonstrated that no such right exists. It is therefore a war of a whole nation against a citizen, whose destruction they consider as necessary, or useful to the general good. *But if I can further demonstrate, that it is neither necessary nor useful*, I shall have gained the cause of humanity.

The death of a citizen *cannot be necessary, but in one case.* When, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government. But even in this case, it can only be necessary when a nation is on the verge of recovering or losing its liberty; or in times of absolute anarchy, when the disorders themselves hold the place of laws. But in a reign of tranquillity; in a form of government approved by the united wishes of the nation; in a state well fortified from enemies without, and supported by strength within, and opinion, perhaps more efficacious; where all power is lodged in the hands of a true sovereign; where riches can purchase pleasures and not authority, there can be no necessity for taking away the life of a subject.

If the *experience of all* ages be not sufficient to prove, that the punishment of death has never prevented determined men from injuring society; if the example of the Romans; if twenty years reign of Elizabeth, empress of Russia, in which she gave the fathers of their country an example more illustrious than many conquests bought with the blood of their sons; if, I say, all this be not sufficient to persuade mankind, who always suspect the voice of reason, and who chuse rather to be led by authority, let us consult human nature in proof of my assertion.

It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance; for our sensibility is more easily and more powerfully affected by weak but repeated im-

pressions, than by a violent, but momentary impulse. The power of habit is universal over every sensible being. As it is by that we learn to speak, to walk, and to satisfy our necessities, so the ideas of morality are stamped on our minds by repeated impressions. The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others, than the continual example of a man deprived of his liberty, condemned as a beast of burthen, to repair by his labour, the injury he has done to society. *If I commit such a crime,* says the spectator to himself, *I shall be reduced to that miserable condition for the rest of my life.* A much more powerful preventative than the fear of death, which men always behold in distant obscurity.

The terrors of death make so slight an impression, that it has not force enough to withstand the forgetfulness natural to mankind, even in the most essential things; especially when assisted by the passions. Violent impressions surprize us, but their effect is momentary; they are fit to produce those revolutions which instantly transform a common man into a Lacedemonian or a Persian; but in a free and quiet government they ought to be rather frequent than strong.

The execution of a criminal is, to the multitude, a spectacle, which in some excites compassion mixed with indignation. These sentiments occupy the mind much more than that salutary terror which the laws endeavour to inspire; but in the contemplation of continued suffering, terror is the only, or at least predominant sensation. The severity of a punishment should be just sufficient to excite compassion in the spectators, as it is intended more for them than for the criminal.

A punishment to be just, should have only that degree of severity which is sufficient to deter others. Now there is no man, who upon the least reflection, would put in competition

the total and perpetual loss of his liberty, with the greatest advantages he could possibly obtain in consequence of a crime. Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death. I say it has more. There are many who can look upon death with intrepidity and firmness; some through fanaticism, and others through vanity, which attends us even to the grave; others from a desperate resolution, either to get rid of their misery, or cease to live: but fanaticism and vanity forsake the criminal in slavery, in chains and fetters, in an iron cage; and despair seems rather to be the beginning than the end of their misery. The mind, by collecting itself and uniting all its force, can, for a moment, repel assailing grief; but its most vigorous efforts are insufficient to resist perpetual wretchedness.

In all nations, where death is used as a punishment, every example supposes a new crime committed. Whereas in perpetual slavery, every criminal affords a frequent and lasting example; and if it be necessary that men should often be witnesses of the power of the laws, criminals should often be put to death; but this supposes a frequency of crimes; and from hence this punishment will cease to have its effect, so that it must be useful and useless at the same time.

I shall be told, that perpetual slavery is as painful a punishment as death, and therefore as cruel. I answer, that if all the miserable moments in the life of a slave were collected into one point, it would be a more cruel punishment than any other; but these are scattered through his whole life, whilst the pain of death exerts all its force in a moment. There is also another advantage in the punishment of slavery, which is, that it is more terrible to the spectator than to the sufferer himself; for the spectator considers the sum of all his wretched moments, whilst the sufferer, by the misery of the present, is prevented from thinking of the future. All evils are increased by the

imagination, and the sufferer finds resources and consolations, of which the spectators are ignorant; who judge by their own sensibility of what passes in a mind, by habit grown callous to misfortune.

Let us, for a moment, attend to the reasoning of a robber or assassin, who is deterred from violating the laws by the gibbet or the wheel. I am sensible, that to develope the sentiments of one's own heart, is an art which education only can teach: but although a villain may not be able to give a clear account of his principles, they nevertheless influence his conduct. He reasons thus. "What are these laws, that I am bound to respect, which makes so great a difference between me and the rich man? He refuses me the farthing I ask of him, and excuses himself, by bidding me have recourse to labour with which he is unacquainted. Who made these laws? The rich and the great, who never deigned to visit the miserable hut of the poor; who have never seen him dividing a piece of mouldy bread, amidst the cries of his famished children and the tears of his wife. Let us break those ties, fatal to the greatest part of mankind, and only useful to a few indolent tyrants. Let us attack injustice at its source. I will return to my natural state of independence. I shall live free and happy on the fruits of my courage and industry. A day of pain and repentance may come, but it will be short; and for an hour of grief I shall enjoy years of pleasure and liberty. King of a small number, as determined as myself, I will correct the mistakes of fortune; and I shall see those tyrants grow pale and tremble at the sight of him, whom, with insulting pride, they would not suffer to rank with their dogs and horses."

Religion then presents itself to the mind of this lawless villain; and promising him almost a certainty of eternal happiness upon the easy terms of repentance, contributes much to lessen the horror of the last scene of the tragedy.

But he who foresees, that he must pass a great number of years, even his whole life, in pain and slavery; a slave to those laws by which he was protected; in sight of his fellow-citizens, with whom he lived in freedom and society; makes an useful comparison between those evils, the uncertainty of his success, and the shortness of the time in which he shall enjoy the fruits of his transgression. The example of those wretches continually before his eyes, makes a much greater impression on him than a punishment, which, instead of correcting, makes him more obdurate.

The punishment of death is pernicious to society, from the example of barbarity it affords. If the passions, or the necessity of war, have taught men to shed the blood of their fellow creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity, the more horrible, as this punishment is usually attended with formal pageantry. Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves? What are the true and most useful laws? Those compacts and conditions which all would propose and observe, in those moments when private interest is silent, or combined with that of the public. What are the natural sentiments of every person concerning the punishment of death? We may read them in the contempt and indignation with which every one looks on the executioner, who is nevertheless an innocent executer of the public will; a good citizen, who contributes to the advantage of society; the instrument of the general security within, as good soldiers are without. What then is the origin of this contradiction? Why is this sentiment of mankind indelible, to the scandal of reason? It is, that in a secret corner of the mind, in which the original impressions of nature are still preserved, men discover a sentiment which tells them, that their lives are not lawfully in the power of any one, but of that necessity only, which with its iron sceptre rules the universe.

What must men think, when they see wise magistrates and grave ministers of justice, with indifference and tranquillity, dragging a criminal to death, and whilst a wretch trembles with agony, expecting the fatal stroke, the judge, who has condemned him, with the coldest insensibility, and perhaps with no small gratification from the exertion of his authority, quits his tribunal to enjoy the comforts and pleasures of life? They will say, "Ah! those cruel formalities of justice are a cloak to tyranny; "they are a secret language, a solemn veil, intended to conceal "the sword by which we are sacrificed to the insatiable idol of "despotism. Murder, which they would represent to us as an "horrible crime, we see practised by them without repugnance, "or remorse. Let us follow their example. A violent death "appeared terrible in their description, but we see that it is the "affair of a moment. It will be still less terrible to him, who not "expecting it, escapes almost all the pain." Such is the fatal, though absurd reasoning of men who are disposed to commit crimes; on whom, the abuse of religion has more influence than religion itself.

If it be objected, that almost all nations in all ages have punished certain crimes with death, I answer, that the force of these examples vanishes, when opposed to truth, against which prescription is urged in vain. The history of mankind is an immense sea of errors, in which a few obscure truths may here and there be found.

But human sacrifices have also been common in almost all nations. That some societies only, either few in number, or for a very short time, abstained from the punishment of death, is rather favourable to my argument, for such is the fate of great truths, that their duration is only as a flash of lightning in the long and dark night of error. The happy time is not yet arrived, when truth, as falshood has been hitherto, shall be the portion of the greatest number.

I am sensible that the voice of one philosopher is too weak to be heard amidst the clamours of a multitude, blindly influenced by custom; but there is a small number of sages, scattered on the face of the earth, who will echo to me from the bottom of their hearts; and if these truths should happily force their way to the thrones of princes, be it known to them, that they come attended with the secret wishes of all mankind; and tell the king who deigns them a gracious reception, that his fame shall outshine the glory of conquerors, and that equitable posterity will exalt his peaceful trophies above those of a Titus, an Antoninus, or a Trajan.

How happy were mankind, if laws were now to be first formed; now that we see on the thrones of Europe, benevolent monarchs, friends to the virtues of peace, to the arts and sciences, fathers of their people, though crowned yet citizens; the increase of whose authority augments the happiness of their subjects, by destroying that intermediate despotism which intercepts the prayers of the people to the throne. If these humane princes have suffered the old laws to subsist, it is doubtless because they are deterred by the numberless obstacles which oppose the subversion of errors established by the sanction of many ages; and therefore every wise citizen will wish for the increase of their authority.

DR. PALEY.

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There are two methods of administering penal justice.

The first method assigns capital punishments to few offences, and inflicts it invariably. The second method assigns capital

punishments to many kinds of offences, but inflicts it only upon a few examples of each kind.

The latter of these two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten are executed; and the preference of this to the former method seems to be founded in the consideration, that the selection of proper objects for capital punishment, principally depends upon circumstances, which, however easy to perceive in each particular case after the crime has been committed, it is impossible to communicate or define beforehand; or to ascertain however with that exactness, which is requisite in legal descriptions. Hence, although it be necessary to fix by precise rules of law, the boundary on one side, that is, the limit to which the punishments may be extended; and also that nothing less than the authority of the whole legislature be suffered to determine that boundary, and assign these rules; yet the mitigation of punishment, the exercise of lenity, may without danger be entrusted to the executive magistrate, whose discretion will operate upon those numerous unforeseen, mutable, and indefinite circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence. Without the power of relaxation lodged in a living authority, either some offenders would escape capital punishment, whom the public safety required to suffer; or some would undergo this punishment where it was neither deserved or necessary. For if judgment of death were reserved for one or two species of crimes only, which would probably be the case, if that judgment was intended to be executed without exception; crimes might occur of the most dangerous example, and accompanied with circumstances of heinous aggravation, which did not fall within *any* description of offences that the laws had made capital, and which consequently could not receive the punishment their own malignity, and the public safety required. What is worse, it would be known beforehand that such crimes might be com-

mitted without danger to the offender's life. On the other hand, if, to reach these possible cases, the whole class of offences to which they belong be subjected to pains of death, and no power of remitting this severity remain any where, the execution of the laws will become more sanguinary than the public compassion would endure, or than is necessary to the general security.

The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offences, it sweeps into the net every crime, which under any possible circumstances may merit the punishment of death; but when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations of whose crimes render them fit examples of public justice. By this expedient few actually suffer death, whilst the dread and danger of it hang over the crimes of many. The tenderness of the law cannot be taken advantage of. The life of the subject is spared, as far as the necessity of restraint and intimidation permits; yet no one will adventure upon the commission of any enormous crime, from a knowledge that the laws have not provided for its punishment. The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries. The charge of cruelty is answered by observing, that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it establishes its last and highest sanctions, trusts to the benignity of the Crown to relax their severity, as often as circumstances appear to palliate the offence, or even as often as those circumstances of aggravation are wanting, which rendered this rigorous interposition necessary. Upon this plan is it enough to vindicate the lenity of the laws, that *some* instances are to be found in each class of capital crimes, which require the restraint of capital punishment;

and that this restraint could not be applied, without subjecting the whole class to the same condemnation?

There is however one species of crimes the making of which capital, can hardly, I think be defended, even upon the comprehensive principle just now stated; I mean that of privately stealing from the person. As every degree of force is excluded by the description of the crime, it will be difficult to assign an example, where either the amount or circumstances of the theft place it upon a level with those dangerous attempts to which the punishment of death should be confined. It will be still more difficult to shew, that without gross and culpable negligence on the part of the sufferer, such examples can ever become so frequent, as to make it necessary to constitute a class of capital offences, of very wide and large extent.

The frequency of capital executions in this country owes its necessity to three causes:—Much liberty, great cities, and the want of a punishment, short of death, possessing a sufficient degree of terror. And if the taking away the life of malefactors be more rare in other countries than in ours, the reason will be found in some difference in these articles. The liberties of a free people, and still more the jealousy with which these liberties are watched, and by which they are preserved, permit not those precautions, and restraints, that inspection, scrutiny, and control, which are exercised with success in arbitrary governments. For example, neither the spirit of the laws or of the people, will suffer the detention or confinement of suspected persons, without proofs of their guilt, which it is often impossible to obtain; nor will they allow that masters of families be obliged to record, and render up a description of the strangers or inmates whom they entertain; nor that an account be demanded, at the pleasure of the magistrate, of each man's time, employment, and means of subsistence; nor securities to be required when these accounts appear unsatisfactory or dubious;

nor men to be apprehended upon the mere suggestion of idleness or vagrancy; nor to be confined to certain districts; nor the inhabitants of each district to be made responsible for one another's behaviour; nor passports to be exacted from all persons entering or leaving the kingdom: least of all will they tolerate the appearance of an armed force, or of military law; or suffer the streets and public roads to be guarded and patrolled by soldiers; or, lastly, entrust the police with such discretionary powers as may make sure of the guilty however they involve the innocent. These expedients, although arbitrary and rigorous, are many of them effectual; and in proportion as they render the commission or concealment of crimes more difficult, they subtract from the necessity of overt punishment.—*Great Cities* multiply crimes by presenting easier opportunities and more incentives to libertinism, which in low life is commonly the introductory stage to other enormities; by collecting thieves and robbers into the same neighbourhood, which enables them to form communications, and confederacies that increase their art and courage, as well as strength, and wickedness; but principally by the refuge they afford to villainy, in the means of concealment, and of subsisting in secrecy, which crowded towns supply to men of every description. These temptations and facilities can only be counteracted by adding to the number of capital punishments.—But a *third* cause, which increases the frequency of capital executions in England, is a defect of the laws, in not being provided with any other punishment than that of death, sufficiently terrible to keep offenders in awe. Transportation, which is the sentence second in the order of severity, appears to me to answer the purpose of example very imperfectly; not only because exile is in reality a slight punishment to those, who have neither property, nor friends, nor reputation, nor regular means of subsistence at home; and because their situation becomes little worse by their crime, than it was before they committed it; but because the punishment, whatever it be, is unobserved and unknown.

A transported convict may suffer under his sentence, but his sufferings are removed from the view of his countrymen: his misery is unseen; his condition strikes no terror into the minds of those, for whose warning and admonition it was intended. This chasm in the scale of punishment produces also two farther imperfections in the adminstration of penal justice: the first is, that the same punishment is extended to crimes of very different character and malignancy; the second, that punishments separated by a great interval, are assigned to crimes hardly distinguishable from each other, in their guilt and mischief.

The end of punishment is twofold, *amendment*, and *example*. In the first of these, the *reformation* of criminals, little has ever been effected, and little I fear is practicable. From every species of punishment that has hitherto been devised, from imprisonment and exile, from pain and infamy, malefactors return more hardened in their crimes, and more instructed. If there be any thing that shakes the soul of a determined villain, it is the expectation of approaching death. The horrors of this situation may cause such a wrench in the mental organs, as to give them a holding turn: and I think it probable, that many of those who are executed, would, if they were delivered at the point of death, retain such a remembrance of their sensations, as might preserve them from relapsing into their former crimes. But this is an experiment that from its nature cannot be repeated often.

Barbarous spectacles of human agony, are justly found fault with, as tending to harden and deprave the public feelings, and to destroy that sympathy with which the sufferings of our fellow creatures ought always to be seen; or if no effect of this kind follow from them, they counteract in some measure their own design, by sinking mens' abhorrence of the crime into commiseration of the criminal. But if a mode of execution could be devised, which would augment the horror of the punish-

ment, without offending or impairing the public sensibility by cruel or unseemly objects of death, it might add something to the efficacy of the example, and, by being reserved for a few atrocious crimes, might also enlarge the scale of punishment; an addition to which seems wanting; for as the matter remains at present, you hang a malefactor for a simple robbery, and can do no more to the villain who has poisoned his father. Somewhat of the sort we have been describing, was the proposal not long since suggested, of casting murderers into a den of wild beasts, where they would perish in a manner dreadful to the imagination, yet concealed from the view.

In estimating the comparative malignancy of crimes of violence, regard is to be had, not only to the proper and intended mischief of the crime, but to the fright occasioned by the attack, to the general alarm excited by it in others, and to the consequences which may attend future attempts of the same kind.

Of frauds or of injuries which are effected without force, the most noxious kinds are forgeries, counterfeiting or diminishing the coin, and the stealing of letters in the course of their conveyance; inasmuch as these practices tend to deprive the public of accommodations, which not only improve the conveniences of social life, but are essential to the prosperity, and even the existence, of commerce. Of these crimes it may be said, that although they seem to affect property alone, the mischief of their operation does not terminate there. For let it be supposed, that the remissness or lenity of the laws should in any country, suffer offences of this sort to grow into such a frequency, as to render the use of money, the circulation of bills, or the public conveyance of letters no longer safe or practicable; what would follow, but that every species of trade and of activity must decline under these discouragements; the sources of sup-

sistence fail, by which the inhabitants of the country are supported; the country itself, where the intercourse of civil life was so endangered and defective, be deserted: and that, beside the distress and poverty which the loss of employment would produce to the industrious and valuable part of the existing community, a rapid depopulation must take place, each execution becoming less numerous than the last, till solitude and barrenness overspread the land: until a desolation similar to what obtains in many countries of Asia, which were once the most civilized and frequented parts of the world, succeed in the place of crowded cities, of cultivated fields, of happy and well-peopled regions. When we carry therefore forwards our views to the more distant, but not less certain consequences of these crimes, we perceive that, although no living creature be destroyed by them, yet human life is diminished; that an offence, the particular consequence of which deprives only an individual of a small portion of his prosperity, and which even in its general tendency seems to do nothing more than to obstruct the enjoyment of certain public conveniences, may nevertheless, by its alternate effects, conclude in the laying waste of human existence. This observation will enable those who regard the divine rule of "life for life, and "blood for blood," as the only authorized and justifiable measure of capital punishment, to perceive, with respect to the quality and effects of the actions, a greater resemblance than they suppose to exist between certain atrocious frauds, and those crimes which attack personal safety.

In the case of forgeries there appears a substantial difference between the forging of bills of exchange, or of securities which are circulated, and of which the circulation and currency are found to serve and facilitate valuable purposes of commerce; and the forging of bonds, leases, mortgages, or of instruments which are not commonly transferred from one hand to another; because, in the former case, credit is ne-

cessarily given to the signature; and, without that credit, the negotiation of such property could not be carried on, nor the public utility sought from it, be attained; in the other case, all possibility of deceit might be precluded, by a direct communication between the parties, or by due care in the choice of their agents, with little interruption to business, and without destroying or much encumbering the uses for which these instruments are calculated. This destruction I apprehend to be not only real, but precise enough to afford a line of division between forgeries, which, as the law now stands, are almost universally capital, and punished with undistinguishing severity.

(Paley's Moral Philosophy.)

BARON MONTESQUIEU.

Published in the Year 1750.

OF THE SEVERITY OF PUNISHMENTS IN DIFFERENT GOVERNMENTS *.

The severity of punishments is fitter for despotic governments, whose principle is terror, than for a monarchy, or a republic, whose spring is honor and virtue.

In moderate governments, the love of one's country, shame, and the fear of blame, are restraining motives, capable of preventing a multitude of crimes. Here the greatest punishment of a bad action is conviction. The civil laws have therefore a

* Chap. ix.

softer way of correcting, and do not require so much force and severity.

In those states, a good legislator is less bent upon punishing, than preventing crimes; he is more attentive to inspire good morals, than to inflict penalties.

It is a constant remark of the Chinese authors, that the more the penal laws were increased in their empire, the nearer they drew towards a revolution. This is because punishments were augmented, in proportion as the public morals were corrupted.

It would be an easy matter to prove, that in all, or almost all the governments of Europe, penalties have increased or diminished, in proportion as those governments favoured or discouraged liberty.

OF THE POWER OF PUNISHMENTS *.

EXPERIENCE shews, that in countries remarkable for the lenity of their laws, the spirit of the inhabitants is as much affected by slight penalties, as in other countries by severer punishments.

If an inconvenience or abuse arises in the state, a violent government endeavours suddenly to redress it; and instead of putting the old laws in execution, it establishes some cruel punishment, which instantly puts a stop to the evil. But the spring of government hereby loses its elasticity; the imagination grows accustomed to the severe as well as the milder punishment; and as the fear of the latter diminishes, they are soon

* Chap. xii.

obliged in every case to have recourse to the former. Robberies on the high-way were grown common in some countries; in order to remedy this evil, they invented the punishment of breaking upon the wheel, the terror of which put a stop for a while to this mischievous practice. But soon after, robberies on the high-ways became as common as ever.

Desertion in our days was grown to a very great height; in consequence of which it was judged proper to punish those delinquents with death; and yet their number did not diminish. The reason is very natural; a soldier, accustomed to venture his life, despises, or affects to despise, the danger of losing it. He is habituated to the fear of shame; it would have been therefore much better to have continued a punishment †, which branded him with infamy for life; the penalty was pretended to be increased, while it really diminished.

Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them. If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments.

Let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it.

But if there be some countries where shame is not a consequence of punishment, this must be owing to tyranny, which has inflicted the same penalties on villains and honest men.

And if there are others where men are deterred only by cruel punishments, we may be sure that this must, in a great mea-

† They slit his nose, or cut off his ears.

sure arise, from the violence of the government, which has used such penalties for slight transgressions.

It often happens that a legislator, desirous of remedying an abuse, thinks of nothing else; his eyes are open only to this object, and shut to its inconveniences. When the abuse is redressed, you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this severity; the minds of the people are corrupted, and become habituated to despotism.

Lysander ‡ having obtained a victory over the Athenians, the prisoners were ordered to be tried, in consequence of an accusation brought against that nation, of having thrown all the captives of two gallies down a precipice, and of having resolved in full assembly to cut off the hands of those whom they should chance to make prisoners. The Athenians were therefore all massacred, except *Adymantes*, who had opposed this decree. *Lysander* reproached *Philocles*, before he was put to death, with having depraved the people's minds, and given lessons of cruelty to all Greece.

The Argives, says Plutarch §, *having put fifteen hundred of their citizens to death, the Athenians ordered sacrifices of expiation, that it might please the Gods to turn the hearts of the Athenians from so cruel a thought.*

There are two sorts of corruption; one when the people do not observe the laws; the other when they are corrupted by the laws: an incurable evil, because it is in the very remedy itself.

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‡ Xenoph. hist. lib. 3.

§ *Morals, of those who are intrusted with the direction of the state affairs.*

INSUFFICIENCY OF THE LAWS OF JAPAN *.

Excessive punishments may even corrupt a despotic government; of this we have an instance in Japan.

Here almost all crimes are punished with death †, because disobedience to so great an Emperor as that of Japan, is reckoned an enormous crime. The question is not so much to correct the delinquent, as to vindicate the authority of the prince. These notions are derived from servitude, and are owing especially to this, that as the Emperor is universal proprietor, almost all crimes are directly against his interests.

They punish with death lies spoken before the magistrates ‡; a proceeding contrary to natural defence.

Even things which have not the appearance of a crime, are severely punished; for instance, a man that ventures his money at play is put to death.

True it is, that the character of this people, so amazingly obstinate, capricious, and resolute, as to defy all dangers and calamities, seems to absolve their legislators from the imputation of cruelty, notwithstanding the severity of their laws. But are men who have a natural contempt of death, and who rip open their bellies for the least fancy; are such men, I say, mended or deterred, or rather are they not hardened, by the continual prospect of punishments?

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* Chap. xiii. † See Kempfer.

‡ Collection of voyages that contributed to the establishment of the East-India Company, tom. 3, p. 428.

The relations of travellers inform us, with respect to the education of the Japanese, that children must be treated there with mildness, because they become hardened to punishment; that their slaves must not be too roughly used, because they immediately stand upon their defence. Would not one imagine, that they might easily have judged of the spirit which ought to reign, in their political and civil government, from that which should prevail in their domestic concerns?

A wise legislator would have endeavoured to reclaim people, by a just temperature of punishments and rewards; by maxims of philosophy, morality, and religion, adapted to those characters; by a just application of the rules of honour, and by the enjoyment of ease and tranquillity of life. And should he have entertained any apprehension, that their minds being inured to the cruelty of punishments, would no longer be restrained by those of a milder nature, he would have conducted himself ‡ in another manner, and gained his point by degrees: in particular cases, that admitted of any indulgence, he would have mitigated the punishment, till he should have been able to extend this mitigation to all cases.

But these are springs to which despotic power is a stranger; it may abuse itself, and that is all it can do: in Japan it has made its utmost effort, and has even surpassed itself in cruelty!

As the minds of the people grew wild and intractable, they were obliged to have recourse to the most horrid severity.

This is the origin, this the spirit of the laws of Japan. The

‡ Let this be observed as a maxim in practice, with regard to cases where the minds of people have been depraved by too great a severity of punishments.

had more fury, however, than force. They succeeded in the extirpation of Christianity; but such unaccountable efforts are a proof of their insufficiency. They wanted to establish a good polity, and they have shown greater marks of their weakness.

We have only to read the relation of the interview between the Emperor and the Deyro at *Meaco* ‡. The number of those who were suffocated or murdered in that city by ruffians, is incredible; young maids and boys were carried off by force, and found afterwards exposed in public places, at unseasonable hours, quite naked, and sewed in linen bags, to prevent their knowing which way they had passed; robberies were committed in all parts, the bellies of horses were ripped open, to bring their riders to the ground; and coaches were overturned in order to strip the ladies. The Dutch, who were told they could not pass the night on the scaffolds, without exposing themselves to the danger of being assassinated, came down, &c.

I shall here give one instance more from the same nation. The Emperor having abandoned himself to infamous pleasures, lived unmarried, and was consequently in danger of dying without issue. The Deyro sent him two beautiful damsels; one he married out of respect, but would not meddle with her. His nurse caused the finest women of the empire to be sent for, but all to no purpose. At length, an armourer's daughter having pleased his fancy §, he determined to espouse her, and had a son. The ladies belonging to the court, enraged to see a person of such mean extraction preferred to

‡ Collection of Voyages that contributed to the establishment of the East-India Company, tom. 5. p. 2.

§ Collection of voyages that contributed to the establishment of the East-India Company, tom. 5. p. 2.

themselves, stifled the child. The crime was concealed from the Emperor; for he would have deluged the land with blood. The excessive severity of the laws hinders therefore their execution: when the punishment surpasses all measure, they are frequently obliged to prefer impunity to it.

OF THE SPIRIT OF THE ROMAN SENATE *.

UNDER the consulate of Acilius Glabrio and Piso, the *Acilian* law† was made, to prevent the intriguing for places. Dio says ‡, that the senate engaged the consuls to propose it, by reason that C. Cornelius the tribune had resolved to cause more severe punishments to be established against this crime, to which the people seemed greatly inclined. The senate rightly judged, that immoderate punishments would strike indeed a terror into people's minds, but must have also this effect, that there would be nobody afterwards to accuse or condemn; whereas by proposing moderate penalties, there would be always judges and accusers.

OF THE JUST PROPORTION BETWIXT PUNISHMENTS AND CRIMES §.

IT is an essential point, that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society, rather than that which is less.

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* Chap. xiv.

† The guilty were condemned to a fine; they could not be admitted into the rank of senators, nor nominated to any public office. Dio, book 36.

‡ Book 36. § Chap. xvi.

"An impostor * who called himself Constantine Ducas, raised a great insurrection at Constantinople. He was taken and condemned to be whipt; but upon informing against several persons of distinction, he was sentenced to be burnt as a calumniator." It is very extraordinary, that they should thus proportion the punishments betwixt the crime of high-treason and that of calumny.

This puts me in mind of a saying of Charles II. king of Great-Britain. He saw a man one day standing in the pillory; upon which he asked what crime the man had committed. He was answered, *Please your Majesty, he has wrote a libel against your ministers. The fool!* said the king, *why did not he write against me? they would have done nothing to him.*

"Seventy persons having conspired against the emperor Basil †, he ordered them to be whipt, and the hair of their heads and beards to be burnt. A stag one day having taken hold of him by the girdle with his horn, one of his retinue drew his sword, cut the girdle, and saved him; upon which he ordered that person's head to be cut off, for having, *said he*, drawn his sword against his sovereign." Who could imagine that the same prince could ever have passed two such different judgments?

It is a great abuse amongst us to condemn to the same punishment a person that only robs on the high-way, and another who robs and murders. Surely, for the public security, some difference should be made in the punishment.

In *China*, those who add murder to robbery, are cut in pieces ‡; but not so the others; to this difference it is owing, that though they rob in that country, they never murder.

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* Hist. of Nicephorus, patriarch of Constantinople.

† In Nicephorus's history.

‡ Du Halde, tom. [illegible] p. 5.

In Russia, where the punishment of robbery and murder is the same, they always murder ‖. The dead, say they, tell no tales.

Where there is no difference in the penalty, there should be some in the expectation of pardon. In England they never murder on the high-way, because robbers have some hopes of transportation, which is not the case in respect to those that commit murder.

Letters of grace are of excellent use in moderate governments. This power which the prince has of pardoning, exercised with prudence, is capable of producing admirable effects. The principle of despotic government, which neither grants nor receives any pardon, deprives it of these advantages.

‖ Present State of Russia, by Perry.

MR. CLARKSON.

FROM HIS PORTRAITURE OF QUAKERISM.

Published in the Year 1807.

I find it almost impossible to proceed to the great courts or meetings of the Society, which I had allotted for my next subject, without stopping awhile to make a few observations on the principles of that part of the discipline, which I have now explained.

It may be observed, *first*, that the great object of this part of the discipline is the reformation of the offending person.

Secondly, that the means of effecting this object consists of religious instruction and advice. And, *thirdly*, that no pains are to be spared, and no time to be limited, for the trial of these means; or, in other words, that nothing is to be left undone, while there is a hope that the offender may be reclaimed. Now these principles the Quakers adopt in the exercise of their discipline, because, as a Christian community, they believe they ought to be guided only by Christian principles, and they know of no other, which the letter or the spirit of Christianity can warrant.

I shall trespass upon the patience of the reader in this place, only till I have made an application of these principles, or till I have shown him how far these might be extended, and extended with advantage to morals, beyond the limits of the Quaker Society, by being received as the basis, upon which a system of penal laws might be founded among larger societies or states.

It is much to be lamented that nations professing Christianity should have lost sight, in their various acts of legislation, of Christian principles, or that they should not have interwoven some such beautiful principles as those, which we have seen adopted by the Quakers, into the system of their penal laws. But if this negligence or omission would appear worthy of regret, if reported of any Christian nation, it would appear most so if reported of our own, where one would suppose that the advantages of civil and religious liberty, and those of a reformed religion, would have had their influence in the correction of our judgments, and in the benevolent dispositions of our will. And yet nothing is more true than that these good influences have either never been produced, or, if produced, that they have never been attended to upon this subject. There seems to be no provision for religious instruction in our numerous prisons. We seem to make no patient trials

of those, who are confined in them, for their reformation; but, on the other hand, we seem to hurry them off the stage of life, by means of a code which annexes death to two hundred different offences, as if we had allowed our laws to have been written by the bloody pen of the pagan Draco. And it seems remarkable that this system should be persevered in, when we consider that death, as far as the experiment has been made in our own country, has little or no effect as a punishment for crimes. Forgery, and the circulation of forged paper, and the counterfeiting of the money of the realm, are capital offences, and are never pardoned. And yet no offences are more frequently committed than these. And it seems still more remarkable when we consider, in addition to this, that, in consequence of the experiments made in other countries, it seems to be approaching fast to an axiom, that crimes are less frequent in proportion as mercy takes the place of severity, or as there are judicious substitutes for the punishment of death.

I shall not inquire, in this place, how far the right of taking away life on many occasions, which is sanctioned by the law of the land, can be supported on the ground of justice, or how far a greater injury is done by it, than the injury the criminal has himself done. As Christians, it seems that we should be influenced by Christian principles. Now, nothing can be more true, than that Christianity commands us to be tender-hearted one to another, to have a tender forbearance one with another, and to regard one another as brethren. We are taught also that men, independently of their accountableness to their own governments, are accountable for their actions in a future state, and that punishments are unquestionably to follow. But where are our forbearance and our love; where is our regard for the temporal and eternal interests of man; where is our respect for the principles of the Gospel,—if we make the reformation of a criminal a less object than his punishment; or if we con-

sign him to death in the midst of his sins, without having tried all the means in our power for his recovery?

Had the Quakers been the legislators of the world, they had long ago interwoven the principles of their discipline into their penal codes, and death had been long ago abolished as a punishment for crimes. As far as they have had any power with legislatures, they have procured an attention to these principles. George Fox remonstrated with the judges in his time on the subject of capital punishments. But the Quakers having been few in number, compared with the rest of their countrymen, and having had no seats in the legislature, and no predominant interest with the members of it, they have been unable to effect any change in England on this subject. In Pennsylvania, however, where they were the original colonists, they have had influence with their own government, and they have contributed to set up a model of jurisprudence worthy of the imitation of the world.

William Penn, on his arrival in America, formed a code of laws chiefly on quaker-principles, in which, however, death was inscribed as a punishment, but it was confined to murder. Queen Anne set this code aside, and substituted the statute and common law of the mother country. It was, however, resumed in time, and acted upon for some years; when it was set aside by the mother country again. From this time it continued dormant till the separation of America from England. But no sooner had this event taken place, which rendered the American states their own legislators, than the Pennsylvanian Quakers began to aim at obtaining an alteration of the penal laws. In this they were joined by worthy individuals of other denominations. And these, acting in union, procured from the legislature of Pennsylvania, in the year 1786, a reform of the criminal code. This reform, however, was not carried, in the opinion of the society, to a sufficient length. Accordingly they took the lead again, and exerted themselves afresh upon

this subject. Many of them formed themselves into a committee for alleviating the miseries of public prisons. Other persons co-operated with them in this undertaking also. At length, after great perseverance, they prevailed upon the same legislature, in the year 1790, to try an ameliorated system. This trial answered so well, that the same legislature again, in the year 1794, established an act, in which several quaker-principles were incorporated, and in which only the crime of premeditated murder was punishable with death.

As there is now but one capital offence in Pennsylvania, punishments for other offences are made up of fine, and imprisonment, and labour; and these are awarded separately or conjointly, according to the magnitude of the crime.

When criminals have been convicted, and sent to the great gaol of Philadelphia to undergo their punishment, it is expected of them that they should maintain themselves out of their daily labour; that they should pay for their board and washing, and also for the use of their different implements of labour; and that they should defray the expenses of their commitment, and of their prosecutions and their trials. An account, therefore, is regularly kept against them. And if, at the expiration of the term of their punishment, there should be a surplus of money in their favour, arising out of the produce of their work, it is given to them on their discharge.

An agreement is usually made about the price of prison-labour between the inspector of the gaol and the employers of the criminals.

As reformation is now the great object in Pennsylvania, where offences have been committed, it is of the first importance that the gaoler and the different inspectors should be persons of moral character. Good example, religious advice, and humane treatment, on the part of these, will have a tendency to produce attention, respect, and love, on the part of the prison-

ers, and to influence their moral conduct. Hence it is a rule, never to be departed from, that none are to be chosen as successors to these different officers but such as shall be found on inquiry to have been exemplary in their lives.

As reformation, again, is now the great object, no corporal punishment is allowed in the prison; no keeper can strike a criminal; nor can any criminal be put into irons. All such punishments are considered as doing harm. They tend to extirpate a sense of shame. They tend to degrade a man, and to make him consider himself as degraded in his own eyes: whereas it is the design of this change in the penal system, that he should be constantly looking up to the restoration of his dignity as a man, and to the recovery of his moral character.

As reformation, again, is now the great object, the following system is adopted *;—No intercourse is allowed between the males and the females, nor any between the untried and the convicted prisoners. While they are engaged in their labour, they are allowed to talk only upon the subject which immediately relates to their work. All unnecessary conversation is forbidden. Profane swearing is never overlooked. A strict watch is kept that no spirituous liquors may be introduced. Care is taken that all the prisoners have the benefit of religious instruction. The prison is accordingly open at stated times to the pastors of the different religious denominations of the place. And as the mind of man may be

* As cleanliness is connected with health, and health with morals, the prisoners are obliged to wash and clean themselves every morning before their work, and to bathe, in the summer season, in a large reservoir of water, which is provided in the court-yard of the prison for this purpose.

worked upon by rewards as well as by punishments, a hope is held out to the prisoners, that the time of their confinement may be shortened by their good behaviour. For the inspectors, if they have reason to believe that a solid reformation has taken place in any individual, have a power of interceding for his enlargement, and the executive government of granting it, if they think it proper. In cases, where the prisoners are refractory, they are usually put into solitary confinement, and deprived of the opportunity of working. During this time the expences of their board and washing are going on; so that they are glad to get into employment again, that they may liquidate the debt, which, since the suspension of their labour, has been accruing to the gaol.

In consequence of these regulations, they, who visit the criminals in Philadelphia, in the hours of their labour, have more an idea of a large manufactory than of a prison. They see nail-makers, sawyers, carpenters, joiners, weavers, and others, all busily employed. They see regularity and order among these. And as no chains are to be seen in the prison, they seem to forget their situation as criminals, and to look upon them as the free and honest labourers of a community following their respective trades.

In consequence of these regulations, great advantages have arisen both to the criminals and to the state. The state has experienced a diminution of crimes to the amount of one half, since the change of the penal system; and the criminals have been restored, in a great proportion, from the gaol to the community, as reformed persons; for few have been known to stay the whole term for their confinement. But no person could have had any of his time remitted him, except he had been considered, both by the inspectors and the executive government, as deserving it. This circumstance of permission to leave the prison, before the time expressed in

the sentence, is of great importance to the prisoners; for it operates as a certificate for them of their amendment to the world at large. Hence no stigma is attached to them for having been the inhabitants of a prison. It may be observed, also, that some of the most orderly and industrious, and such as have worked at the most profitable trades, have had sums of money to take on their discharge, by which they have been able to maintain themselves honestly, till they could get into employ.

Such was the state, and such the manner of execution, of the penal laws of Pennsylvania, as founded upon quaker-principles. So happy have the effects of this new system already been, that it is supposed it will be adopted by the other American states. May the example be universally followed! May it be universally received as a truth, that true policy is inseparable from virtue; that in proportion as principles become lovely on account of their morality, they will become beneficial when acted upon, both to individuals and to states; or that legislators cannot raise a constitution upon so fair and firm a foundation as upon the gospel of Jesus Christ!

SIR THOMAS MORE.

Published about the Year 1520.

I was then much obliged to that Reverend Prelate John Morton, Archbishop of Canterbury, Cardinal, and Chancellor of England; a man, said he, Peter (for Mr. More knows well what he was) that was not less venerable for his wisdom and virtues, than for the high character he bore; he was of a

middle stature, not broken with age, his looks begot reverence rather than fear; his conversation was easy, but serious and grave; he sometimes took pleasure to try the force of those that came as suitors to him upon business, by speaking sharply, though decently to them, and by that he discovered their spirit and presence of mind; with which he was much delighted, when it did not grow up to impudence, as bearing a great resemblance to his own temper; and he looked on such persons as the fittest men for affairs. He spoke both gracefully and weightily; he was eminently skilled in the law, had a vast understanding, and a prodigious memory: and those excellent talents with which nature had furnished him, were improved by study and experience. When I was in England the king depended much on his councils, and the government seemed to be chiefly supported by him; for from his youth, he had been all along practised in affairs; and having passed through many traverses of fortune, he had with great cost acquired a vast stock of wisdom, which is not soon lost, when it is purchased so dear. One day when I was dining with him, there happened to be at table one of the English lawyers, who took occasion to run out in a high commendation of the severe execution of justice upon thieves, who, as he said, were then hanged so fast, that there were sometimes twenty on one gibbet; and upon that he said, he could not wonder enough how it came to pass, that since so few escaped, there were yet so many thieves left who were still robbing in all places. Upon this, I who took the boldness to speak freely before the cardinal, said, there was no reason to wonder at the matter, since this way of punishing thieves, was neither just in itself, nor good for the public; for as the severity was too great, so the remedy was not effectual: simple theft not being so great a crime, that it ought to cost a man his life; no punishment how severe soever, being able to restrain those from robbing, who can find out no other way of livelihood. In this, said I, not only you in England,

but a great part of the world, imitate some ill masters, that are readier to chastise their scholars, than to teach them. There are dreadful punishments enacted against thieves, but it were much better to make such good provisions, by which every man might be put in a method how to live, and so be preserved from the fatal necessity of stealing, and of dying for it.

There is then a long discussion between the parties, upon the causes of theft—which concludes in the following manner.

If you do not find a remedy to these evils, it is a vain thing to boast of your severity in punishing theft; which though it may have the appearance of justice, yet in itself is neither just nor convenient: for if you suffer your people to be ill educated, and their manners to be corrupted from their infancy, and then punish them for those crimes, to which their first education disposed them, what else is to be concluded from this, but that you first make thieves, and then punish them.

While I was talking thus, the councellor who was present had prepared an answer, and had resolved to resume all I had said, according to the formality of a debate, in which things are generally repeated more faithfully than they are answered; as if the chief trial to be made, were of men's memories. You have talked prettily for a stranger, said he, having heard of many things among us, which you have not been able to consider well: but I will make the whole matter plain to you, and will first repeat in order all that you have said, then I will shew how much your ignorance of our affairs has misled you, and will in the last place answer all your arguments. And that I may begin where I promised, there were four things—hold your peace, said the cardinal, this will take up too much time; therefore we will at present ease you of the trouble of answering, and reserve it to our next meeting, which shall be to-morrow, if Raphael's affairs and your's can admit of it: but Raphael, said he to me, I would gladly know upon what reason

it is, that you think theft ought not to be punished by death? Would you give way to it? Or do you propose any other punishment that will be more useful to the public? For since death does not restrain theft, if men thought their lives would be safe, what fear or force could restrain ill men? On the contrary, they would look on the mitigation of the punishment, as an invitation to commit more crimes. I answered, it seems to me a very unjust thing to take away a man's life for a little money; for nothing in the world can be of equal value with a man's life: and if it is said, that it is not for the money that one suffers, but for his breaking the law; I must say, extreme justice is an extreme injury: for we ought not to approve of these terrible laws that make the smallest offences capital; nor of that opinion of the stoicks, that makes all crimes equal, as if there were no difference to be made between the killing a man, and the taking his purse, between which, if we examine things impartially, there is no likeness nor proportion. God has commanded us not to kill, and shall we kill so easily for a little money? But if one shall say, that by that law we are only forbid to kill any, except when the laws of the land allow of it; upon the same grounds, laws may be made in some cases to allow of adultery and perjury: for God having taken from us the right of disposing, either of our own, or of other peoples lives, if it is pretended that the mutual consent of men in making laws, can authorize manslaughter in cases in which God has given us no example, that it frees people from the obligation of the divine law, and so makes murder a lawful action; what is this, but to give a preference to human laws before the divine? And if this is once admitted, by the same rule, men may in all other things put what restrictions they please upon the laws of God. If by the Mosaical law, though it was rough and severe, as being a yoke laid upon an obstinate and servile nation, men were only fined, and not put to death for theft; we cannot imagine that in this new law of mercy, in which God treats us with the tenderness of a father, he has

given us a greater licence to cruelty than he did to the Jews. Upon these reasons it is that I think putting thieves to death is not lawful; and it is plain and obvious that it is absurd, and of ill consequence to the commonwealth, that a thief and a murderer should be equally punished: for if a robber sees that his danger is the same if he is convicted of theft, as if he were guilty of murder, this will naturally incite him to kill the person whom otherwise he would only have robbed, since if the punishment is the same, there is more security, and less danger of discovery, when he that can best make it is put out of the way; so that terrifying thieves too much, provokes them to cruelty.

But as to the question, what more convenient way of punishment can be found? I think that it is much more easy to find out that, than to invent any thing that is worse; why should we doubt but the way that was so long in use among the old Romans, who understood so well the arts of government, was very proper for their punishment? They condemned such as they found guilty of great crimes, to work their whole lives in quarries, or to dig in mines with chains about them. But the method that I liked best, was that which I observed in my travels in Persia, among the Polylerits, who are a considerable and well governed people. They pay a yearly tribute to the king of Persia; but in all other respects they are a free nation and governed by their own laws. They lie far from the sea, and are environed with hills; and being contented with the productions of their own country, which is very fruitful, they have little commerce with any other nation; and as they, according to the genius of their country, have no inclination to enlarge their borders, so their mountains, and the pension they pay to the Persian, secure them from all invasions. Thus they have no wars among them; they live rather conveniently than with splendour, and may be rather called an happy nation, than either eminent or famous: for I do not think

that they are known so much as by name to any but their next neighbours. Those that are found guilty of theft among them, are bound to make restitution to the owner, and not, as it is in other places, to the prince, for they reckon that the prince has no more right to the stolen goods than the thief; but if that which was stolen is no more in being, then the goods of the thieves are estimated, and restitution being made out of them, the remainder is given to their wives and children: and they themselves are condemned to serve in the public works, but are neither imprisoned, nor chained, unless there happened to be some extraordinary circumstances in their crimes. They go about loose and free, working for the public: if they are idle or backward to work, they are whipped, but if they work hard, they are well used and treated without any mark of reproach, only the lists of them are called always at night, and then they are shut up: they suffer no other uneasiness, but this of constant labour; for as they work for the public, so they are well entertained out of the public stock, which is done differently in different places; in some places, whatever is bestowed upon them, is raised by a charitable contribution; and though this way may seem uncertain, yet so merciful are the inclinations of that people, that they are plentifully supplied by it; but in other places, public revenues are set aside for them; or there is a constant tax of a poll-money raised for their maintenance. In some places they are set to no public work, but every private man that has occasion to hire workmen, goes to the market place and hires them of the public, a little lower than he would do a freeman: if they go lazily about their task, he may quicken them with the whip. By this means there is always some piece of work or other to be done by them; and, beside their livelihood, they earn somewhat still to the public. They all wear a peculiar habit, of one certain colour, and their hair is cropt a little above their ears, and a piece of one of their ears is cut off. Their friends are allowed to give them either meat, drink, or cloaths,

sell the cattle dear, so if they are consumed farther than the breeding countries from which they are brought, can afford them; then the stock must decrease, and this must needs end in great scarcity; and by these means this your island, which seemed as to this particular, the happiest in the world, will suffer much by the cursed avarice of a few persons; besides this, the rising of corn makes all people lessen their families as much as they can; and what can those who are dismissed by them do, but either beg or rob? And to this last, a man of a great mind is much sooner drawn than to the former. Luxury likewise breaks in apace upon you, to set forward your poverty and misery; there is an excessive vanity in apparel, and great cost in diet; and that not only in noblemen's families, but even among tradesmen; among the farmers themselves, and among all ranks of persons. You have also many infamous houses, and besides those that are known, the taverns and ale-houses are no better; add to these, dice, cards, tables, foot-ball, tennis, and coits, in which money runs fast away; and those that are initiated into them, must in the conclusion betake themselves to robbing for a supply. Banish these plagues, and give orders that those who have dispeopled so much soil, may either rebuild the villages they have pulled down, or let out their grounds to such as will do it: restrain those engrossings of the rich, that are as bad almost as monopolies; leave fewer occasions to idleness; let agriculture be set up again, and the manufacture of the wool be regulated, that so there may be work found for those companies of idle people, whom want forces to be thieves, or who now being idle vagabonds, or useless servants, will certainly grow thieves at last. If you do not find a remedy to these evils, it is a vain thing to boast of your severity in punishing theft; which though it may have the appearance of justice, yet in itself is neither just nor convenient: for if you suffer your people to be ill educated, and their manners to be corrupted from their infancy, and then punish them for those crimes, to which their first education

disposed them, what else is be concluded from this, but that you first make thieves, and then punish them?

While I was talking thus, the counsellor who was present had prepared an answer, and had resolved to resume all I had said, according to the formality of a debate, in which things are generally repeated more faithfully than they are answered; as if the chief trial to be made, were of men's memories. You have talked prettily for a stranger, said he, having heard of many things among us, which you have not been able to consider well: but I will make the whole matter plain to you, and will first repeat in order all that you have said, then I will shew how much your ignorance of our affairs has misled you, and will in the last place answer all your arguments. And that I may begin where I promised, there were four things—hold your peace, said the cardinal, this will take up too much time; therefore we will at present ease you of the trouble of answering, and reserve it to our next meeting, which shall be to-morrow, if Raphael's affairs and your's can admit of it: but Raphael, said he to me, I would gladly know upon what reason it is, that you think theft ought not to be punished by death? Would you give way to it? Or do you propose any other punishment that will be more useful to the public? For since death does not restrain theft, if men thought their lives would be safe, what fear or force could restrain ill men? On the contrary, they would look on the mitigation of the punishment, as an invitation to commit more crimes. I answered, it seems to me a very unjust thing to take away a man's life for a little money; for nothing in the world can be of equal value with a man's life: and if it is said, that it is not for the money that one suffers, but for his breaking the law; I must say, extreme justice is an extreme injury: for we ought not to approve of these terrible laws that make the smallest offences capital; nor of that opinion of the stoicks, that makes all crimes equal, as if there were no difference to be made between the killing a

man, and the taking his purse, between which, if we examine things impartially, there is no likeness nor proportion. God has commanded us not to kill, and shall we kill so easily for a little money? But if one shall say, that by that law we are only forbid to kill any, except when the laws of the land allow of it; upon the same grounds, laws may be made in some cases to allow of adultery and perjury: for God having taken from us the right of disposing, either of our own, or of other peoples lives, if it is pretended that the mutual consent of men in making laws, can authorize manslaughter in cases in which God has given us no example, that it frees people from the obligation of the divine law, and so makes murder a lawful action; what is this, but to give a preference to human laws before the divine? And if this is once admitted, by the same rule, men may in all other things put what restrictions they please upon the laws of God. If by the Mosaical law, though it was rough and severe, as being a yoke laid upon an obstinate and servile nation, men were only fined, and not put to death for theft; we cannot imagine that in this new law of mercy, in which God treats us with the tenderness of a father, he has given us a greater licence to cruelty than he did to the Jews. Upon these reasons, it is that I think putting thieves to death is not lawful; and it is plain and obvious that it is absurd, and of ill consequence to the commonwealth, that a thief and a murderer should be equally punished: for if a robber sees that his danger is the same, if he is convicted of theft, as if he were guilty of murder, this will naturally incite him to kill the person whom otherwise he would only have robbed, since if the punishment is the same, there is more security, and less danger of discovery, when he that can best make it is put out of the way; so that terrifying thieves too much, provokes them to cruelty.

But as to the question, what more convenient way of punishment can be found? I think that it is much more easy to find

out that, than to invent any thing that is worse; why should we doubt but the way that was so long in use among the old Romans, who understood so well the arts of government, was very proper for their punishment? They condemned such as they found guilty of great crimes, to work their whole lives in quarries, or to dig in mines with chains about them. But the method that I liked best, was that which I observed in my travels in Persia, among the Polylerits, who are a considerable and well governed people. They pay a yearly tribute to the king of Persia; but in all other respects they are a free nation, and governed by their own laws. They lie far from the sea, and are environed with hills; and being contented with the productions of their own country, which is very fruitful, they have little commerce with any other nation; and as they, according to the genius of their country, have no inclination to enlarge their borders, so their mountains, and the pension they pay to the Persian, secure them from all invasions. Thus they have no wars among them; they live rather conveniently than with splendour, and may be rather called an happy nation, than either eminent or famous; for I do not think that they are known so much as by name to any but their next neighbours. Those that are found guilty of theft among them, are bound to make restitution to the owner, and not, as it is in other places, to the prince, for they reckon that the prince has no more right to the stolen goods than the thief; but if that which was stolen is no more in being, then the goods of the thieves are estimated, and restitution being made out of them, the remainder is given to their wives and children: and they themselves are condemned to serve in the public works, but are neither imprisoned, nor chained, unless there happened to be some extraordinary circumstances in their crimes. They go about loose and free, working for the public: if they are idle or backward to work, they are whipped, but if they work hard, they are well used and treated without any mark of reproach, only the lists of them are called always at night, and then they are shut up: they suffer no

other uneasiness, but this of constant labour; for as they work for the public, so they are well entertained out of the public stock, which is done differently in different places; in some places, whatever is bestowed upon them, is raised by a charitable contribution; and though this way may seem uncertain, yet so merciful are the inclinations of that people, that they are plentifully supplied by it; but in other places, public revenues are set aside for them; or there is a constant tax of a poll-money raised for their maintenance. In some places they are set to no public work, but every private man that has occasion to hire workmen, goes to the market places and hires them of the public, a little lower than he would do a freeman: if they go lazily about their task, he may quicken them with the whip. By this means there is always some piece of work or other to be done by them; and beside their livelihood, they earn somewhat still to the public. They all wear a peculiar habit, of one certain colour, and their hair is cropt a little above their ears, and a piece of one of their ears is cut off. Their friends are allowed to give them either meat, drink, or cloaths, so they are of their proper color; but it is death, both to the giver and taker, if they give them money; nor is it less penal for any freeman to take money from them, upon any account whatsoever: and it is also death for any of these slaves (so they are called) to handle arms. Those of every division of the country, are distinguished by a peculiar mark; which it is capital for them to lay aside, to go out of their bounds, or to talk with a slave of another jurisdiction; and the very attempt of an escape, is no less penal than an escape itself; it is death for any other slave to be accessary to it; and if a freeman engages in it, he is condemned to slavery: those that discover it are rewarded; if freemen, in money; and if slaves, with liberty, together with a pardon for being accessary to it; that so they might find their account, rather in repenting of their engaging in such a design, than in persisting in it.

These are their laws and rules in relation to robbery; and it is obvious that they are as advantageous, as they are mild and gentle; since vice is not only destroyed, and men preserved, but they treated in such a manner as to make them see the necessity of being honest, and of employing the rest of their lives, in repairing the injuries they have formerly done to society. Nor is there any hazard of their falling back to their old customs: and so little do travellers apprehend mischief from them, that they generally make use of them for guides, from one jurisdiction to another; for there is nothing left them by which they can rob, or be the better for it; since as they are disarmed, so the very having of money is a sufficient conviction: and as they are certainly punished if discovered, so they cannot hope to escape; for their habit being in all the parts of it different from what is commonly worn, they cannot fly away, unless they would go naked, and even then their cropped ear would betray them. The only danger to be feared from them, is their conspiring against the government: but those of one division and neighbourhood can do nothing to any purpose, unless a general conspiracy were laid amongst all the slaves of the several jurisdictions, which cannot be done, since they cannot meet or talk together; nor will any venture on a design, where the concealment would be so dangerous, and the discovery so profitable. None are quite hopeless of recovering their freedom, since by their obedience and patience, and by giving good grounds to believe that they will change their manner of life for the future, they may expect at last to obtain their liberty: and some are every year restored to it, upon the good character that is given of them. When I had related all this, I added, that I did not see why such a method might not be followed with more advantage, than could ever be expected from that severe justice which the counsellor magnified so much. To this he answered, that it could never take place in England, without endangering the whole nation. As he said this, he shook his head, made some grimaces and held his peace, while all the company seemed of his opi-

nion, except the Cardinal, who said that it was not easy to form a judgment of its success, since it was a method that never yet had been tried; but if, said he, when the sentence of death was past upon a thief, the Prince would reprieve him for a while, and make the experiment upon him, denying him the privilege of a sanctuary; and then, if it had a good effect upon him, it might take place; and if it did not succeed, the worst would be, to execute the sentence on the condemned person at last. And I do not see, added he, why it would be either unjust, inconvenient, or at all dangerous, to admit of such a delay; in my opinion, the vaganbods ought to be treated in the same manner; against whom, though we have made many laws, yet we have not been able to gain our end. When the Cardinal had done, they all commended the motion, though they had despised it when it came from me; but more particularly commended what related to the vagabonds, because it was his own observation.

EXECUTION OF NUNDCOMAR.

From the Annual Register of 1788.

INSERTED TO EXPLAIN THE EFFECT PRODUCED BY THE PUNISHMENT OF DEATH UPON A NATION NOT ACCUSTOMED TO CAPITAL PUNISHMENTS.

Sir Gilbert Elliot, towards the conclusion of his speech, read the following account of the execution of Nundcomar, written by the Sheriff who attended on the occasion.

"*Hearing that some persons had supposed Mah Rajah Nundcomar, would make an address* to the people at his

execution, I have committed to writing the following minutes of what passed both on that occasion, and also upon my paying him a visit in prison, the preceding evening, while both are fresh in my remembrance.

"Friday evening, the 4th. of August, upon my entering his apartments in the gaol, he arose and saluted me in his usual manner: after we were both seated, he spoke with great ease, and such seeming unconcern, that I really doubted whether he was sensible of his approaching fate. I therefore bid the interpreter inform him, that I was come to shew him this last mark of respect, and to assure him, that every attention should be given, the next morning, which could afford him comfort on so melancholy an occasion; that I was deeply concerned that the duties of my office, made me of necessity a party in it, but that I would attend to the last, to see that every desire that he had should be gratified; that his own palanquin, and his own servants, should attend him, and that such of his friends, who I understood were to be present, should be protected. He replied that he was obliged to me for this visit, that he thanked me for all my favours, and entreated me to continue them to his family; that fate was not to be resisted, and putting his finger to his forehead—'God's will be done.' He desired I would present his respects and compliments to the General, Colonel Monson, and Mr. Francis, and pray for their protection of Rajah Gourdass: that they would please to look upon him now as the head of the Bramins. His composure was wonderful; not a sigh escaped him; nor the smallest alteration of voice or countenance, though I understood that he had not many hours before taken a solemn leave of his son-in-law Roy Radicum. I found myself so much second to him in firmness, that I could stay no longer. Going down stairs, the gaoler informed me, that since the departure of his friends, he had been writing notes, and looking at accounts in his usual way. I began now to apprehend that he

had taken his resolution, and fully expected that he would be found dead in the morning; but on Saturday the 5th. at seven, I was informed that every thing was in readiness at the gaol for the execution. I came here about half an hour past seven. The howlings and lamentations of the poor wretched people who were taking their last leave of him are not to be described. I have hardly recovered the first shock, while I write this above three hours afterwards. As soon as he heard I was arrived, he came down into the yard, and joined me in the gaoler's apartment. There was no lingering about him, no affected delay. He came cheerfully into the room, made the usual salaam, but would not sit till I took a chair near him. Seeing somebody look at a watch, he got up, and said he was ready, and immediately turning to three Bramins, who were to attend and take care of his body, he embraced them all closely; but without the least mark of melancholy or depression on his part, while they were in agonies of grief and despair. I then looked at my own watch, told him the hour I had mentioned was not arrived, that it wanted above a quarter of eight, but that I should wait his own time, and that I would not rise from my seat without a motion from him. Upon its being recommended to him, that at the place of execution he would give some signal when he had done with this world, he said he would speak. We sat about a quarter of an hour longer, during which he addressed himself more than once to me, mentioned Rajah Gourdass, the General, Colonel Monson, and Mr. Francis, but without any seeming anxiety; the rest of the time, I believe, he passed in prayer; his lips and tongue moving, and his beads hanging upon his hand. He then looked to me and arose, spoke to some of the servants of the gaol, telling them that any thing he might have omitted, Rajah Gourdass would take care of; then walked cheerfully to the gate, and seated himself in his palanquin, looking around him with perfect unconcern. As the deputy sheriff and I followed,

we could make no observation upon his deportment, till we all arrived at the place of execution. The crowd there was very great, but not the least appearance of a riot. The Rajah sat in his palanquin upon the bearer's shoulders, and looked around at first with some attention. I did not observe the smallest discomposure in his countenance or manner at the sight of the gallows, or any of the ceremonies passing about it. He asked for the Bramins, who were not come, and shewed some earnestness, as if he apprehended the execution might take place before their arrival. I took that opportunity of assuring him I would wait his own time; "it was early in the day, and there was no hurry." The Bramins soon after appearing, I offered to remove the officers, thinking that he might have something to say in private; but he made a motion not to do it, and said, he had only a few words to remind them of, what he had said concerning Rajah Gourdass, and the case of his Zenana. He spoke to me, and desired that the men might be taken care of, as they were to take charge of his body, which he desired repeatedly might not be touched by any of the bystanders; but he seemed not in the least alarmed or discomposed at the crowd around him. There was some delay in the necessary preparations, and from the awkwardness of the people: he was no way desirous of protracting the business, but repeatedly told me he was ready. Upon my asking him if he had any more friends he wished to see, he answered, he had many, but this was neither a place, or an occasion to look for them. Did he apprehend there might be any present, who could not get up for the crowd? He mentioned one, whose name was called; but he immediately said "it was of no "consequence, probably he had not come." He then desired me to remember him to General Clavering, Colonel Monson, and Mr. Francis, and looked with the greatest composure. When he was not engaged in conversation, he lay back in the palanquin, moving his lips and tongue as before. I then caused him to be asked about the signal he was to make, which

could not be done by speaking on account of the noise of the crowd. He said he would make a motion with his hand; and when it was represented to him that it would be necessary for his hands to be tied, in order to prevent any involuntary motion, and I recommended his making a motion with his foot, he said he would. Nothing now remained but the last painful ceremony. I ordered his palanquin to be placed close under the gallows, but he chose to walk, which he did more erect than I have generally seen him. At the foot of the steps which led to the stage, he put his hands behind him to be tied with a handkerchief, looking around at the same time, with the utmost unconcern; some difficulties arising about the cloth which should be tied over his face, he told the people that it must not be done by one of us. I presented to him a subaltern sepoy officer, who is a Bramin, and he came forward with a handkerchief in his hand, but the Rajah pointed to a servant of his own, who was laying prostrate at his feet, and beckoned him to do it. He had some weakness in his feet, which added to the confinement of his hands, made him mount the steps with difficulty. But he shewed not the least reluctance, scrambling rather forward to get up. He then stood erect on the stage, while I examined his countenance as stedfastly as I could, till the cloth covered it, to see if I could observe the smallest symptom of fear, or alarm, but there was not a trace of it. My own spirits sunk, and I stept into my palanquin; but before I was well seated, he had given the signal, and the stage was removed. I could observe, when I was a little recovered, that his arms lay back in the same position, in which I saw them first tied, nor could I perceive any contortion of that side of his mouth and face which was visible. In a word, his steadiness, composure, and resolution throughout the whole of this melancholy transaction, were equal to any examples of fortitude I have ever read or heard of. The body was taken down after hanging the usual time, and delivered to the Bramins for burning."

While this tragedy, said Sir Gilbert, was acting, the surrounding multitudes were agitated with grief, fear, and suspence. With a kind of superstitious incredulity, they could not believe that it was really intended to put the Rajah to death; but when they saw him tied up, and the scaffold drop from under him, they set up an universal yell, and with the most piercing cries of horror and dismay, betook themselves to flight, running, many of them as far as the Ganges, and plunging into the water, as if to hide themselves from such tyranny as they had witnessed, or to wash away the pollution contracted from viewing such a spectacle.

It may, perhaps, be proper to add, that Nundcomar was executed upon a charge of forgery; that he was 70 years of age at the time of his execution: and that he was a Bramin, a rank considered sacred amongst the Hindoos.

P. COLQUHOUN, LL. D.

Published in the Year 1800.

NEXT to the blessings which a nation derives from an excellent constitution and system of general laws, are those advantages which result from a well-regulated and energetic plan of police, conducted and enforced with purity, activity, vigilance, and discretion.

Upon this depends, in so great a degree, the comfort, the happiness, and the true liberty and security of the people, that too much labour and attention cannot possibly be bestowed in rendering complete the domestic administration of justice, in all cases of criminal delinquency.

That much remains to be done in this respect no person will deny; all ranks must bear testimony to the dangers which both life and property are at present subjected to, by the number of criminal people, who, from various causes (which it is the object of the writer of these pages to explain,) are suffered with impunity to repeat acts of licentiousness and mischief, and to commit depredations upon individuals and the public.—In vain do we boast of those liberties which are our birthright, if the vilest and most depraved part of the community are suffered to deprive us of the privilege of travelling upon the highways, or of approaching the capital in any direction after dark, without risk of being assaulted and robbed; and perhaps wounded or murdered.

In vain may we boast of the security which our laws afford us, if we cannot lie down to rest in our habitations, without the dread of a burglary being committed, our property invaded, and our lives exposed to imminent danger before the approach of morning.

Imperfect must be, either the plan or the execution, or both, of our criminal code, if crimes are found to increase; if the moral principle ceases to be a check upon a vast proportion of the lower ranks of the people; and if small thefts are known to prevail in such a degree, as to affect almost all ranks of the community who have any property to lose, as often as opportunities occur, whereby pilfering in a little way can be effected without detection.

If in addition to this, the peace of society can, on every

specious pretence, be disturbed by the licentious clamours or turbulent effusions arising from the ill-regulated passions of vulgar life, surely it becomes an interesting inquiry, worthy the attention of every intelligent member of the community, *from what source spring these numerous inconveniences; and where is a remedy to be found for so many accumulated evils?* —In developing the causes which have produced that want of security, which it is believed prevails in no other civilized country in so great a degree as in England, it will be necessary to examine how far the system of criminal jurisprudence has been, hitherto, applicable to the prevention of crimes.

If we look back to the measures pursued by our ancestors two centuries ago, and before that period, we shall find that many wholesome laws were made with a view to prevention, and to secure the good behaviour of persons likely to commit offences. Since that æra in our history, a different plan has been pursued. Few regulations have been established to restrain vice, or to render difficult the commission of crimes; while the statute books have been filled with numerous laws, in many instances doubtfully expressed, and whose leading feature has generally been severe punishment. These circumstances, aided by the false mercy of juries in cases of slight offences, have tended to let loose upon society a body of criminal individuals, who under a better police,—an improved system of legislation, and milder punishments,—might, after a correction in penitentiary houses, or employment in out-door labour, under proper restraints, have been restored to society as useful members.

As the laws are at present administered, it is a melancholy truth, not to be contradicted, that the major part of the criminals who infest this metropolis, although committed by magistrates for trial on very satisfactory proof, are returned upon the public in vast numbers, year after year; encouraged

to renew their former practices, by the facility they experience in evading justice.

But this is not all: the adroit thief and receiver, availing themselves of their pecuniary resources, often escape, from their knowledge of the tricks and devices which are practised, through the medium of disreputable practitioners of the law; while the novices in delinquency generally suffer the punishment attached to conviction. If, as is the case in some other countries, evidence were allowed to be received of the general character of persons put upon their trial for offences, and the means by which they obtain their subsistence, so as to distinguish the old reputed thief and receiver, from the novice in crimes, the minds of jurymen would be often enlightened, to the furtherance of substantial justice; and a humane and proper distinction might be made between the young pupil of depravity, and the finished villain; as well in the measure of punishment, as in the distribution of mercy.

The severity of the punishment, which at present attaches to crimes regarded by mankind as of an inferior nature, and which affect property in a trivial manner, is also deserving the most serious attention. It is only necessary to be acquainted with the modern history of the *criminal prosecutions, trials, acquittals, and pardons in this country*, in order to be completely convinced, that the progressive increase of delinquents, and the evils experienced by society from the multitude of petty crimes, result in a great measure from this single circumstance. —It will scarcely be credited by those, whose habits of life do not permit them to enter into discussions of this sort, that by the laws of England, there are above *one hundred and sixty* different offences, which subject the parties who are found guilty, to death, without benefit of clergy. This multiplicity of capital punishments must, in the nature of things, defeat those ends, the attainment of which ought to be the object of all law, namely, *the prevention of crimes*.

In consequence of this severity, (to use the words of an admired writer,) "the injured, through compassion, will often to forbear prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one half the convicts, and recommend them to royal mercy."*

The Roman empire never flourished so much as during the æra of the Portian law, which abrogated the punishment of death for all offences whatever. When severe punishments, and an incorrect police were afterwards revived, the empire fell. —It is not meant, however, to be insinuated that this would be, altogether, a proper system of criminal jurisprudence to be adopted in modern times.

In the present state of society it becomes indispensably necessary, that offences, which in their nature are highly injurious to the public, and where no mode of prevention can be established, should be punished by the forfeiture of life; but these dreadful examples should be exhibited as seldom as possible: for while on the one hand, such punishments often defeat the ends of justice, by their not being carried into execution; so on the other, by being often repeated, they lose their effect upon the minds of the people.†

However much we glory (and we ought to glory) in the general excellence of our criminal law, yet there is no truth more clear and obvious than this:—"That this code exhibits too much the appearance of a heterogeneous mass, con-

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* Blackstone's Commentaries.

† Can that be thought a correct system of jurisprudence, which inflicts the penalty of death, for breaking down the mound of a

cocted too often on the spur of the occasion (as Lord Bacon expresses it) and frequently without that degree of accuracy which is the result of able and minute discussion, or a due attention to the revision of the existing laws, or how far their provisions bear upon new and accumulated statutes introduced into parliament; often without either consideration or knowledge, and without those precautions which are always necessary, when laws are to be made which may affect the property, the liberty, and perhaps even the lives of thousands."

Some steps have, indeed, been taken in parliament, since this work first appeared, towards a general revision of our statute law,* and which, it is hoped, will ere long be adopted. Whenever the time shall arrive that the existing laws, which form the present criminal code, shall be referred to able and intelligent men effectually to revise, consolidate, and adjust the whole, in a manner best suited to the present state of society and manners, the investigation will unquestionably excite no little wonder and astonishment.

Penal laws, which are either obsolete or absurd, or which have arisen, from an adherence to rules of common law, when the reasons have ceased upon which these rules are founded;

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fish-pond, whereby the fish may escape; or cutting down a fruit tree in a garden or orchard; or stealing a handkerchief, or any trifle, privately from a person's pocket, above the value of 12d;---while a number of other crimes of much greater enormity, are only punished with transportation and imprisonment; and while the punishment of murder itself is, and can be, only death, with a few circumstances of additional ignominy?

* See the "Report from the Committee of the House of Commons on Temporary Laws," May 13, 1796, and also the "Report from the Committee for Promulgation of the Statutes," December 5, 1796, and the "Resolutions of a Committee of the whole house," March 30, 1797.

and in short, all laws which appear not to be consonant to dictates of truth and justice, the feelings of humanity, and indelible rights of mankind should be abrogated and pealed * (a).

PUNISHMENT, (says a learned and respectable author) *is evil which a delinquent suffers, unwillingly, by the order o judge or magistrate; on account of some act done which the l prohibits, or something omitted which the law enjoins.*

All punishment should be proportioned to the nature the offence committed; and the legislature, in adjusti punishment with a view to the public good, ought, accordi to the dictates of sound reason, to act on a comparison of crime under consideration, with other offences injurious society; and thus by comparing one offence with another, form a scale, or gradation of punishments, as nearly as po ble consistent with the strict rules of distributive justice —It is the triumph of liberty, says the great Montesquieu, wh the criminal laws proportion punishments to the particu nature of each offence. It may be further added, t when this is the case, it is also the triumph of reas —In order to ascertain in what degree the public is inju or endangered by any crime, it is necessary to weigh well a dispassionately the nature of the offence, as it affects the co munity. It is through this medium, that treason and reb lion are discovered to be higher and more dangerous offen than breaches of the peace by riotous assemblies; as su riotous meetings are in like manner considered as more crin nal than a private assault.

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* Blackstone. (a) Chap. 1, p. 1 to p. 8.

† Beccaria on Crimes and Punishments. Cap. 6.

In punishing delinquents, two objects ought to be invariably kept in view.

1. The amendment of the delinquent.
2. The example afforded to others.

To which may be added in certain cases,

3. Retribution to the party injured.

If we attend to reason, the *mistress of all law*, she will convince us that it is both unjust and injurious to society, to inflict death, except for the highest offences, and in cases where the offender appears to be incorrigible.

Wherever the amendment of a delinquent is in view, it is clear that his punishment cannot extend to death; if expatiating an offence by the loss of life is to be (as it certainly is at present) justified by the necessity of making examples for the purpose of preventing crimes, it is evident that the present system has not had that effect, since they are by no means diminished; and since even the dread of this punishment, has, under present circumstances, so little effect upon guilty associates, that it is no uncommon thing for these hardened offenders to be engaged in new acts of theft, at the very moment their companions in iniquity are launching, in their very presence, into eternity.

The minds of offenders, long inured to the practice of criminal pursuits, are by no means beneficially affected by the punishment of death, which they are taught to consider as nothing but a momentary paroxysm, which ends all their distress at once; nay, even as a relief, which many of them, grown desperate, look upon with a species of indifference, bordering on a desire to meet that fate, which puts an end to the various distresses and anxieties attendant on a life of criminality. —The effect of capital punishments, in the manner they are now conducted, therefore, as far as relates to example, appears to be much less than has been generally imagined.

Examples would probably have much greater force, even on those who appear at present dead to shame and the stigma of infamy, were convicts exhibited day after day, to their companions, occupied in mean and servile employments in penitentiary houses, or on the highways, canals, mines, or public works.—It is in this way only that there is the least chance of making retribution to the parties whom they have injured; or of re-imbursing the state, for the unavoidable expence which their evil pursuits have occasioned.

Towards accomplishing the desireable object of perfection in a criminal code, every wise legislature will have it in contemplation rather to prevent than to punish crimes; that if the chastisement given, the delinquent may be restored to society as an useful member.

This purpose may possibly be best effected by the adoption of the following general rules.

1. That the statute laws should accurately explain the enormity of the offence forbidden; and that its provisions should be clear and explicit, resulting from a perfect knowledge of the subject, so that justice may not be defeated in the execution.

2. That the punishments should be proportioned and adapted, as nearly as possible, to the different degrees of offences; with a proper attention also to the various shades of enormity, which may attach to certain crimes.

3. That persons prosecuting, or compelled so to do, should not only be indemnified from expense; but also that reparation should be made, for losses sustained by the injured party, in all cases where it can be obtained from the labour, or property of the delinquent.

4. That satisfaction should be made to the state for the injury done to the community; by disturbing the peace and violating the purity of society.

Political laws, which are repugnant to the law of nature and reason, ought not to be adopted. The objects abovementioned seem to include all that can be necessary for the attention of lawgivers.

If on examination of the frame and tendency of our criminal laws, both with respect to the principles of reason and state policy, the author might be allowed to indulge a hope, that what he brings under the public eye on this important subject, would be of use in promoting the good of mankind, he should consider his labours as very amply rewarded. —The severity of the criminal laws is not only an object of horror, but the disproportion of the punishments, as will be shewn in the course of this work, breaths too much the spirit of DRACO,* who boasted that "he punished all crimes with death; because small crimes deserved it, and he could find no other punishment for the greatest."

Though the ruling principle of our government is unquestionably *liberty*, it is much to be feared that the rigour which the laws indiscriminately inflict on slight, as well as more atrocious offences, can be ill reconciled to the true distinctions of morality, and strict notions of justice, which form the peculiar excellence of those states which are to be characterised as free.

By punishing smaller offences with extraordinary severity, is there not a risque of inuring men to baseness, and of plunging them into the sink of infamy and despair, from whence they seldom fail to rise capital criminals; often to the destruction of their fellow-creatures, and always to their own inevitable perdition?

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* He lived 624 years before the Christian æra.

To suffer the lower orders of the people to be ill educated—to be totally inattentive to those wise regulations of state policy, which might serve to guard and improve their morals; and then to punish them for crimes which have originated in bad habits, has the appearance of a cruelty not less severe, than any which is exercised under the most despotic governments.—There are two circumstances which ought also to be minutely considered in apportioning the measure of punishment—*the immorality of the action, and its evil tendency.*—Nothing contributes in a greater degree to deprave the minds of the people, than the little regard which laws pay to morality; by inflicting more severe punishments on offenders, who commit, what may be termed *political crimes*, and crimes against property, than on those who violate religion and virtue.

When we are taught, for instance, by the measure of punishment, that it is considered by the law as a greater crime to coin a sixpence, than to kill our father or mother, nature and reason revolt against the proposition.

In offences which are considered by the legislature as merely personal, and not in the class of public wrongs, the disproportionate punishment is extremely shocking.

If, for example, a personal assault is committed, of the most cruel, aggravated, and violent nature, the offender is seldom punished in any other manner than by fine and imprisonment; but if a delinquent steals from his neighbour secretly more than the value of twelve-pence, the law dooms him to death. And he can suffer no greater punishment (except the ignominy exercised on his dead body), if he robs and murders a whole family.—Some private wrongs of a flagrant nature are even past over with impunity: the seduction of a married woman—the de-

struction of the peace and happiness of families, resulting from alienating a wife's affections, and defiling her person, is not an offence punishable by the criminal law; while it is death to rob the person, who has suffered this extensive injury, of a trifle exceeding a shilling *(a)*.

IMPERFECT in many respects as the criminal law appears, from what has been detailed and stated in the preceding chapters, and much as the great increase of capital offences, created during the last and present century, is to be lamented:—it cannot be denied that several changes have taken place in the progress of society, favourable to the cause of humanity, and more consonant to reason and justice, in the appropriation and the mode of inflicting punishments.

The benefit of clergy, which for a long period exempted clerical people only, from the punishment of death in cases of felony, was by several statutes * extended to *peers*, *women*, and all persons *able to read*; who, pleading their clergy, suffered only a corporal punishment, or a year's imprisonment; and those men who *could not read*, if under the degree of peerage, were hanged †.

This unaccountable distinction was actually not removed until the 5th. of Queen Anne, cap. 6, which extended the benefit of clergy to all who were intitled to ask it, *whether they could read or not*.

(a) Chap. 2, p. 29 to p. 35.

* 1 Edward VI. cap. 12: 21 Jac. I. cap. 6: 3 and 4 William and Mary, cap. 9: 4 and 5 William and Mary, cap. 24.

† Blackstone.

In the course of the present century, several of the old sanguinary modes of punishment have been either, very properly abolished by acts of parliament, or allowed, to the honor of humanity, to fall into disuse :—such as *burning alive (particularly women) cutting off hands or ears, slitting nostrils, or branding in the hand or face ;* and among lesser punishments, falling into disuse, may be mentioned, *the ducking-stool.* —The punishment of death for felony (as has already been observed) has existed since the reign of Henry I. nearly 700 years.—Transportation is commonly understood to have been first introduced, anno 1718, by the act of the 4th George I. cap. 11 ; and afterwards enlarged by the act 6th of George I. c. 23, which allowed the court a discretionary power to order felons, who were by law entitled to their clergy, to be transported to the American plantations for seven or fourteen years, according to circumstances.

Since that period the mode of punishment has undergone several alterations: and many crimes which were formerly considered of an inferior rank, have been rendered capital; which will be best elucidated by the following catalogue of offences divided into six classes according to the law now in force :—

1. CRIMES *punishable by the* deprivation of life; *and where upon the conviction of the offenders, the sentence of death must be pronounced by the judge.—Of these, it has been stated, the whole, on the authority of Sir William Blackstone, including all the various shades of the same offence, is about* 160 *in number.*

The principal are the following :

Arson, or wilfully and maliciously burning a House, Barns with Corn, &c. *see page* 56.

Attempting to kill Privy Councillors, &c.

Bankrupts not surrendering, or concealing their Effects.

Being accessaries to Felonies deemed capital.

Breaking down the head of a Fish-pond, whereby Fish may be lost, *(Black Act.)**.

Burglary, or House Breaking in the night time.

Challenging Jurors above 20, in capital Felonies; or standing mute.

Concealing the death of a Bastard Child.

Cottons, selling with forged Stamps.

Cutting down Trees in an Avenue, Garden, &c.

Cutting down River, or Sea Banks.

Cutting Hop Binds.

Destroying Ships, or setting them on Fire.

Destroying Silk or Velvet in the loom; or the Tools for manufacturing thereof; or destroying Woollen Goods, Racks or Tools, or entering a house for that purpose.

Deer-Stealing, second offence; or even first offence, under Black Act, not usually enforced.

Destroying Turnpikes or Bridges, Gates, Weighing Engines, Locks, Sluices, Engines for draining Marshes, &c.

Escape by breaking Prison in certain cases.

Forgery of Deeds, Bonds, Bills, Notes, Public Securities, &c. &c. Clerks of the Bank embezzling Notes, altering Dividend Warrants; Paper Makers, unauthorized, using moulds for Notes, &c.

Government Stores, embezzling, burning or destroying in Dock-Yards; in certain cases.

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* The unwillingness which it must be expected a Jury would have to convict a man capitally for *this offence*, might be adduced, among many other instances, to show to what extent public justice is defeated, merely from the severity of the laws, and the want of a scale of punishments proportioned to the offences.

Highway Robbery.

House Breaking in the day time.

Maiming or Killing Cattle maliciously, *See* the Black Act. 9 Geo. I. cap. 22.

Maliciously maiming or disfiguring any person, &c. lying in wait for the purpose.

Mutiny, Desertion, &c. by the Martial and Statute law.

Murder.

Personating Bail, or acknowledging fines, or judgments in another's name.

Piracy, or robbing ships and vessels at sea; under which is included, the offences of sailors forcibly hindering their captains from fighting.

Prisoners under Insolvent Acts, guilty of perjury.

Privately Stealing or Picking Pockets, above one Shilling.

Pulling down Houses, Churches, &c.

Rape, or the forcible violation of chastity.

Returning from Transportation; or being at large in the Kingdom after Sentence.

Riots by twelve or more, and not dispersing in an hour after proclamation.

Robbery of the Mail.

Sacrilege.

Setting fire to coal mines.

Servants purloining their Master's Goods, value 40s.

Sending Threatening letters (Black Act).

Shooting at a Revenue Officer: or at any other Person, *See* the Black Act.

Shop Lifting above Five Shillings.

Smuggling by persons armed; or assembling armed for that purpose.

Sodomy, a crime against nature, committed either with man or beast.

Soldiers or Sailors enlisting into Foreign Service.

Stealing an Heiress, *See page* 48.

Stealing Bonds, Bills, or Bank Notes.

Stealing Bank Notes, or Bills from Letters.

Stealing above 40s. in any House, *see page* 55.

Stealing above 40s. on a River.

Stealing Linen, &c. from Bleaching Grounds, &c. or destroying Linen therein.

Stealing Horses, Cattle, or Sheep.

Stabbing a Person unarmed, or not having a weapon drawn, if he die in six months.

Stealing Woollen Cloths from Tenter Grounds.

Stealing from a Ship in Distress.

Taking a Reward for helping another to Stolen Goods, in certain cases, *See page* 295.

Treason, and petty treason, *see page* 38, *&c.* Under the former of these is included the offence of counterfeiting the gold and silver coin, *see page* 191—211.

Uttering counterfeit Money, third offence *(a)*.

(a) Chap. xvi. p. 435 to 440.

A TABLE, *shewing the Prisoners tried at the Old Bailey, from April 1793, to March 1794, inclusive.*

London, Middlesex, and Westminster.	Persons committed for trial.	Of whom acquitted and discharged.	Prisoners convicted, and their Punishments.								
			Death.	Transported for 14 years.	Transported for 7 years.	Whipt & imprisoned.	Imprisoned 6 months and upwards.	Imprisoned 3 months & otherwise disposed of.	Sent to serve the King.	Judgment respited.	Total punished.
London Sessions	199	70	6	1	50	10	29	20	8	5	129
Middlesex and Westminster	861	497	62	1	117	38	51	49	30	16	364
	1060	*567	68	2	167	48	80	69	38	21	493

* The acquittals will generally be found to attach mostly to small offences which are punishable with death: where Juries do not consider the crime deserving so severe a punishment, the delinquent receives no punishment at all. If all were convicted who were really guilty of these small offences, the number of victims to the severity of the law would be greatly increased.

Thus it appears, that in London only, of 1060 prisoners, tried in the course of a year, only 493 were punished; of whom 197, after a temporary confinement, would return upon the public, with little prospect of being better disposed to be useful to society, than before.—It may be estimated that in all England, including those offenders who are tried at the county sessions, upwards of five thousand individuals, charged with criminal offences, are thrown back upon society every year.

But this is not all,—for according to the present system, out of about *two hundred* and upwards, who are, upon an average every year, doomed to suffer the punishment of death, *four-fifths* or more are generally pardoned * either on condition of being transported, or of going into his Majesty's service, and not seldom, without any condition at all.

Hence it is, that, calculating on all the different chances, encouragements to commit crimes actually arise out of the system intended for their prevention;—*first, from the hope of avoiding detection and apprehension; secondly of escaping conviction, from the means used to vitiate and suborn the evidence; thirdly, from the mercy of the Jury, in considering the punishment too severe; and fourthly, from the interest of persons of rank or consideration, applying (under circumstances where humanity becomes the friend of every*

* As punishments became more mild, clemency and pardons became less necessary.—Clemency is a virtue that ought to shine in the code, and not in the private judgment. The Prince in pardoning gives up the public security in favor of an individual; and by the exercise of this species of benevolence, proclaims a public act of impunity. Let the executors of the laws be inexorable, but let the legislature be tender, indulgent, and humane.—Beccaria, cap. 46.

person doomed to die,) for the interference of Royal mercy, by pardons (a).

THE next stated in the class of evils is, that which arises from the laws as they now stand, relative to *punishments*.—Their extreme severity, in rendering such a multitude of crimes capital, which juries can never be made to believe are of that nature, in point of actual atrocity, has proved a very serious misfortune to the country, in the administration of criminal justice.—Because the punishment is too severe, it frequently happens that the delinquent is sent back upon society, encouraged to renew his depredations upon the public by his having escaped (although guilty) without any chastisement at all.

It is unquestionably true, and little doubt will be entertained by any who attentively examine this work, that the dread of severe punishment, in the manner the law is executed at present, has not the least effect in deterring hardened offenders from the commission of crimes.

An opinion seems to have been formed, that crimes were to be prevented by the severity of the punishment. That this opinion has been erroneous seems to be proved by incontestible evidence, adduced in various parts of this work; and elucidated by a variety of reasoning, which it is hoped cannot fail to bring conviction to the mind of every reader, who will bestow time in the investigation of a subject of so much importance to society *(b)*.

(a) Chap. xvi. p. 448 to 450.

(b) Chap. xx. p. 615 to 616.

PASTORET.

Published in the Year, 1790.

(Chap. xxi. Vol. 2.)

A List of Capital Offences in France, in the Year, 1790.

Behold a list of the crimes punishable by death, and even this does not comprehend the whole.

1. Enormous blasphemy.
2. Composing works against religion.
3. Or causing them to be written.
4. Or printing them.
5. Sacrilege joined to superstition and impiety.
6. Sacrilege with the profanation of sacred things.
7. Pulling down or destroying crosses and images.
8. Every act of scandal and impious sedition.
9. Heretics assembling with arms.
10. Heretical preaching.
11. Witchcraft and magic.
12. Regicide.
13. Outrage against the persons of the king's children.
14. Leagues and associations.
15. Enlisting Soldiers unlawfully.
16. Plots.
17. Not disclosing a plot.
18. To parley with an enemy, without the consent of the commanders of the army.
19. Omitting to inform the commanders of a letter or message received from a prince, or nobleman belonging to the enemy.
20. To levy troops without permission from the king.
21. Unlicensed assemblies under any pretence whatever.

22. To wear armour, carry arms, arquebuses, &c. not being ordered into garrison, or on the king's service.
23. Screening or favoring those who have carried arms unlawfully.
24. Desertion.
25. Collecting arms for horse or foot soldiers.
26. Buying without permission, more powder, shot or matches, than is wanted for the necessary defence of one's house.
27. Casting ordnance, or having it in possession without leave.
28. To fortify castles, or to seize on those already fortified.
29. Counterfeiting the current coin.
30. Circulating counterfeit coin, or introducing it into the kingdom.
31. Clipping of coin.
32. Buying the clippings
33. Coiners delivering Coin below the standard; too light, or imperfect in other respects.
34. Receivers and paymasters, who knowingly distribute counterfeit money.
35. Bankers who fail to cut in the presence of the seller, the pieces of gold and silver coin which they have bought.
36. To carry more gold or silver out of the kingdom, than is necessary for the voyage.
37. Foreigners, or even natives, who deal in coin at a price above its value, if they buy it to export, or for the use of forgers.
38. Locksmiths, blacksmiths, and other workers in iron, who shall have made utensils or tools for coining, even when the intention is unknown to them.
39. Those who shall have engraved dies, and other instruments used in the fabrication of specie, without permission of the officers of the mint.
40. Carriers who knowingly convey the instruments used in coining, without informing the solicitors-general or surveyors.
41. Clerks of the general and particular receivers offices, having the managemeut of public affairs, who embezzle more than three thousand livres.
42. Treasurers, receivers and other overseers, embezzling the public money.
43. Extortion, under certain circumstances.
44. To abuse and insult magistrates, officers, door-keepers or bailiffs in the execution of justice.

45. Receiving or concealing a person condemned to death.
46. Breaking prison, in certain cases.
47. Wilful murder.
48. To associate with murderers, under any pretence whatever.
49. The plotting to kill, injure or abuse any one, although it be not carried into effect.
50. Highway robbery.
51. Theft with burglary.
52. House breaking.
53. Theft in the king's palaces, without any regard to the value of the goods stolen.
54. Robbery in the Banks.
55. Robbers of a church and their accomplices, according to the exigence of the case.
56. Those who associate with thieves.
57. Those who conceal or receive stolen goods, when the theft deserves death.
58. Nightly robbery with arms.
59. Sometimes nightly robbery with ladders.
60. Robbery by pick-locks.
61. The crime of improperly detaining a person according to circumstances.
62. A galley slave mutilating himself.
63. Taking poison whether it prove mortal or not.
64. To make or distribute poisonous compositions.
65. To know that they have been asked for or given, and not to inform the solicitor general, or his deputy, according to circumstances and the exigences of the case.
66. Duelling.
67. Arson.
68. Parricide.
69. Incest in a direct line.
70. Incest, by ecclesiastical law.
71. Rape.
72. Forcible abduction.
73. Seduction, according to circumstances.
74. Confining young women by means of Letres de catchet, in order to marry or cause them to be married without consent of parents or guardians.
75. Noblemen who force their subjects, or others, to give their daughters or wards in marriage.
76. Concealment of pregnancy.
77. Procuring abortion.
78. Unnatural crime.

79. A person taking the law into his own hands.
80. Fraudulent bankruptcy.
81. Monopoly of corn.
82. Breach of public trust.
83. Forging letters and seals of chancery.
84. Forging the signature of secretaries of state.
85. Counterfeiting, forging, or altering edicts, royal records, or other royal or public papers.
86. Counterfeiting, or altering papers relating to receivers treasurers, &c. royal or public.
87. Farmers of the revenue of whatever condition, who forge receipts, discharges, accounts, and inventories.
88. Forging a duplicate of a deed.
89. To cast, copy, or counterfeit the marks of the towns, in which there is a magistrate, or of the revenue of farmers.
90. Applying the counter mark in any manner to gold, or silver goods, which have not been taken to be assayed, and marked at the public office.
91. Bearing false witness, which shall endanger the life of the accused.
92. Smuggling tobacco, printed clothes, &c. by five or more armed persons in company.
93. Officers holding correspondence with smugglers.
94. Smugglers forcing doors, and guard houses of revenue officers.
95. Revenue officers convicted of having been unlicenced salt merchants, or of having participated in the trade.
96. Dealing in salt by the officers of the warehouses or depots.
97. Smuggling salt by five armed persons in company.
98. To print, sell, or circulate books, or new compositions, without permission granted in the manner prescribed.
99. The master convicted of having delivered up his ship to the enemy.
100. The master convicted of having maliciously wrecked or destroyed his vessel.
101. Mariners or passengers in vessels who cause any difficulty in the exercise of the catholic religion.
102. A ship writer who makes false entries in his register.
103. A pilot who maliciously causes the destruction of a vessel.
104. A coast pilot guilty of the same crime.
105. Wasting a ship's liquors, or destroying bread by seamen or others.
106. Causing a leak in a ship.
107. To excite sedition, in order to frustrate the voyage.
108. Striking the master under arms.

109. Captains who detain, or suffer any thing to be taken from vessels belonging to the king's subjects, or allies, who lower their sails and produce their charter-parties and policies.
110. Sinking captured vessels.
111. Putting prisoners on shore, in an island, or distant country, to conceal the prize.
112 Robbery of cordage, or shipping utensils, and cutting or stealing cables, if it occasion the loss of the ship, or the death of a man.
113. To place false lights upon the sea shore, and in dangerous places, for the purpose of misleading and wrecking the vessels.
114. To attempt the life or goods of persons shipwrecked.
115. Foot or horse soldiers who run after shipwrecks.

One hundred and fifteen crimes punished by death.*

THOUGHTS ON EXECUTIVE JUSTICE.

Published in the Year 1785.

This work may, as it seems, be divided into five parts, or propositions:—1st. That punishment to be effectual, should be certain. 2dly. That there are more crimes in England

* Notwithstanding this catalogue, it seems that the executions in France were not so numerous as in England. When Mirabeau was in England, he asked a friend, with whom he was dining, if it were true that twenty young men had been executed that morning at Newgate? upon being answered that, if the daily papers asserted it, there was no reason to doubt the assertion; he replied, with great warmth and surprize, "The English are the most merciless people I ever heard or read of in my life." *See Remarks on the General Orders, &c. by Gilbert Wakefield.*—Mirabeau did not live to witness the atrocities committed by his own countrymen.

than in any other civilized country. 3dly. That this frequency of crime in England is occasioned by the uncertainty of punishment. 4thly. That this uncertainty of punishment is occasioned by the improper lenity of the judges and juries. 5thly. The laws of England are not severe.

1st. *Punishment to be effectual should be certain.*

CERTAINTY of punishment carries a terror to the heart, which is not easily overcome; but when that *certainty* decreases, the terror will decrease in the same proportion. *(a)*

All writers on the subject of laws, that I have ever met with, as Plato, Cicero, &c. among the ancients; Montesquieu, the Marquis of Beccaria, &c. among the moderns; all contend for the certainty of punishment, in order to render laws respected and efficacious. The same reason for which a law is enacted, must certainly call for the certainty of its execution; for to enact a law, and not to inforce the execution of it, is against all reason. *(b)*

2dly. *There are more crimes in England than in any other country.*

No civilized nation, that I know of, has to lament, as we have, the daily commission of the most dangerous and atrocious crimes, insomuch that we cannot travel the roads, or sleep * in our houses, or turn our cattle into our fields, without

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(a) Page 61. *(b)* Page 131.

* An house at *Paris*, a few years ago, was supposed to have been attempted in the night time;—the matter ended in the family being disturbed, and whatever occasioned this, soon ceased; but the master of the house said, that he thought his house had been attacked "*par des rossignols Anglois*:"—which droll expression sufficiently shews, that the frequency of *burglaries* in this country, are so far from being unnoticed by our neighbours on the continent, as to have become in a manner *proverbial*.

the most imminent danger of thieves and robbers. These are increased to such a degree in numbers, as well as audaciousness, that the *day* is now little less dangerous than the *night* to travel in; and we are not without fatal instances of the most wanton cruelty and barbarity, exercised on many of those unfortunate persons, who have fallen into the hands of these plunderers of the public. *(c)*

Highway-robberies threaten the traveller, whether by night or by day—the lurking footpad lies, like a dangerous adder, in our roads and streets—the horrid burglar, like an evil spirit, haunts our dwellings, "*making night hideous.*"—The farmer loses his sheep from the fold, the ox from his stall, and all sorts of people their horses from their fields, and even from their stables. These are but a part of that dreadful catalogue of offences, with which every *Old Bailey*, and every *Assize Calendar* is filled, and with which this country is disgraced and insulted: and for which it has become a taunt and a proverb in the mouths of foreigners. *(d)*

It is a very great scandal and reproach to a country, which pretends to civilization, that we are not more secure in our property of every kind, than if we were savages. Perhaps we are, upon the whole, *less* so; for I much question whether there is to be found a people upon earth, who suffer in the invasion of their properties as we do. *(e)*

In *France*, capital offences seldom, if ever, meet with a relaxation of the laws,—robberies and burglaries especially; and therefore they are very seldom* heard of. I believe, in

(c) Page 4. (d) Page 14. (e) Page 44.

* In the days of Queen Anne, during the war in Flanders, when the Duke of Marlborough and Prince Eugene commanded the allied army, a soldier, under the immediate department of Prince Eugene, was condemned to be hanged for marauding. The

no country but this, are *felons* safe from the law; and therefore there are ten times the number of felons among us, than in any other country. *(f)*

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man happened to be a favourite with his officers, who took great pains to save his life; and for this purpose interceded with the Prince, who refused absolutely to grant their request. They then applied to the Duke of Marlborough, begging his Grace to interfere: he accordingly went to Prince Eugene; who said, he "never did, and never would, consent to the pardon of a marauder,"—"Why," said the Duke, "at this rate, we shall hang half the army. I pardon a great many." "That is the reason, replied the Prince, that so much mischief is done by your people, and that so many suffer for it. I never pardon any, and therefore there are very few to be punished in my department." The Duke still urged his request; on which the Prince said, "let the matter be inquired into, and if your Grace has not executed more than I have done, I will consent to the pardon of this fellow." The proper inquiries were accordingly made, and the numbers turned out very highly in favour of Prince Eugene; on which he said to the Duke, "there, my Lord, you see the benefit of example. You pardon *many*, and therefore you are forced to execute *many*; I never pardon *one*, therefore *few* dare to offend, and, of course, but *few* suffer."

The reasoning, which may be drawn from the above, on the side of strict discipline, is not only applicable to *fleets* and *armies*, but to all government whatsoever: the civil interest of society can no otherwise be protected, than by a *due* and *certain* execution of the laws. The Marquis of Beccaria observes, very truly, that—"a *less* punishment, which is *certain*, will do more good than a *greater*, which is *uncertain*."

The above anecdote may also serve as an illustration of those seeming paradoxes—

Crudelitas parcens, Lenitas puniens:

and is exceedingly applicable to our proceedings, with respect to punitive justice, as administered in this kingdom; where so many wretches suffer for crimes, which they have been tempted to commit through hope of *impunity*.

(f) Page 60.

How shocking is it to consider, that in a trading country like this, where persons are obliged to travel at all hours, no man can stir out a mile from his house, without an apprehension of being robbed, and perhaps murdered! For of late, we have had instances of the most savage barbarity exercised on the persons of his Majesty's subjects, whose fate it has been to be met by robbers. *(g)*

As to the metropolis, we may say of every part of it, as Juvenal says of Rome, in its worst estate: *(h)*

——————Qui spoliet te
Non deerit, clausis domibus postquam omnis ubique
Fixa catenatæ siluit compagu tabernæ.
Interdum et ferro subitus grassator agit rem,
Armato quoties turba custode tenentur
Et Pomptiana palus, & Gillinaria pinus.
Sic inde huc omnes tanquam ad vivaria currunt.
Qua fornace graves, qua non incude catenæ?
Maximus in vinclis ferri modus, ut timeas, ne
Vomer deficiat, ne marræ & sarcula desint.
Felices proavorum atavos, felicia dicas
Secula, quæ quondam, sub regibus atque tribunis,
Viderunt uno contentum carcere Romam.

SAT. iii. l. 302—314.

Thus excellently imitated by Dr. Johnson.

In vain, these dangers past, your doors you close,
And hope the balmy blessings of repose;
Cruel with guilt, and daring with despair,
The midnight murd'rer bursts the faithless bar;
Invades the sacred hour of silent rest,
And plants, unseen, a dagger in your breast.

Scarce can our fields, such crouds at Tyburn die,
With hemp the gallows and the fleet supply.

(g) Page 73. (h) Page 89 to 91.

Propose your schemes, ye senatorian band,
Whose ways and means support the sinking land;
Lest ropes be wanting, in the tempting spring,
To rig another convoy for the king.

A single jail, in *Alfred's* golden reign,
Could half the nation's criminals contain:
Fair justice then, without constraint ador'd,
Held high the steady scale, but deep'd the sword;
No spies were paid, no special juries known;
Blest age! but ah! how different from our own!

3dly. *The frequency of crime in England is occasioned by the uncertainty of punishment.*

The law is not in fault; it is wisely contrived to prevent them, by holding forth *certain* punishment; but that punishment has been rendered so *uncertain*, or rather the suspension of it so *certain*, as to prevent the operation of the laws.(*a*)

I remember to have seen a fellow at Bristol, who was by trade a *viper-catcher*. He produced, and opened, a large box, with about one hundred vipers in it, into which he put his hand, and took them up, at least, half a dozen in a bunch. I trembled at the sight, expecting, every instant, to see the man bitten: but my fears were soon removed, by being told, that all their fangs were cut out; so that if I had pleased, I could myself have handled these horrid creatures with all safety.(*b*)

Methinks, that our criminal laws are reduced to the state of the aforesaid *vipers*: their sting is gone, their fangs are out, their terror is lost; and our *viper-catchers* seem to have so contrived the matter, as that the laws shall hurt nobody who chuses to sport with them. (*c*)

(*a*) Page 34. (*b*) Page 35. (*c*) Ibid.

Since I began these sheets, I have had some conversation with an eminent barrister, upon these subjects; and he furnished me with an anecdote, which abundantly illustrates what has been said. *(g)*

Some years ago, when he went the Norfolk circuit, he accidentally had occasion to see a fellow who had been capitally convicted, and having received sentence of death, was remanded to prison. It seems he had been an old offender, and before had had some hair-breadth 'scapes for his life. My friend expostulated with him, and asked him how he could venture again on his old practices, after so many escapes? "Ah, sir," said the fellow, "that's the very thing; there are so many "chances *for* us, and so few *against* us, that I never thought "of coming to this. First," said he, "there are many chances "against being discovered; so many more that we are not "taken; and if taken, not convicted; and if convicted, not "hanged; that I thought myself very safe, with at least "twenty to one in my favour." *(h)*

The argument which this *villain* used, is, no doubt in the thoughts of all the rogues in the kingdom, who find equal encouragement to persist in their evil courses, with this fellow; for the newspapers assure them, on relating the conviction and condemnation of the criminals, at the several assize-towns, that, "they were *all reprieved* before their Lordships left the town." I will not say *always*, but this is most *usually* the case *(i)*.

A soldier in one of the last encampments, took to marauding, and stole whatever he pleased from the poor cottagers, whose misfortune it was to dwell in the neighbourhood of the camp. He particularly fixed on a little garden belonging to two old people, a man and his wife, and used to come in open day, in

(g) Page 36. (h) Page 37. (i) Page 38.

the sight of the owners, and take their cabbages, and other such-like things, for his own purposes; the poor old woman had often remonstrated with him on these occasions, but only got oaths and curses, and threats for her pains. One night (in the middle of the night it was) this villain forced open the door; these poor people were in bed; and he dragged the woman out of bed, to her infinite terror and astonishment, made her tell where their money was, and robbed them of their little *all*, which amounted to *five shillings*. These circumstances appeared to demonstration on the trial, and the fellow was convicted of this atrocious and shocking fact. He received sentence of death. He was *reprieved* * before the judge left the town! *(a)*

At an assizes after this, an highwayman was convicted, on the clearest evidence, of a most audacious robbery in the *day time*. Three ladies were together in a chariot, two of them very young. The robber overtook the chariot, and, with the most horrid oaths and imprecations, swore he would blow out the coachman's brains if he did not stop. On the chariot being stopped, the villain held a *cocked pistol* to the breast of one of the young ladies, for about *a minute and an half*, (this the coachman swore positively) and, in this situation, he plundered the ladies of some money. During this transaction, we may well suppose the terror of the young lady to be

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* If this affair had happened in a rich and opulent family, and the lady of the house had been dragged out of bed at midnight, and the house robbed—what *judge* would have *dared* to reprieve the offender? yet, if it had been done in *that case*, it would not have been so injurious as in *this*, because the rich can afford, in a great measure, to defend their houses, by dogs, servants, arms, &c. whereas the poor have no defence, but the law. If this be withheld, they are totally defenceless.

(*a*) Page 53.

very great, and to be not a little heightened by the fellow's threatening to shoot a poor woman, who stopped by the side of the carriage, if she did not walk on. (*h*)

The perpetrator of the above audacious fact, was an old offender, who had twice before been indicted, tried, and convicted of highway robbery—once at an assizes for the same county, in the year 1777, for robbing a gentleman on the highway, of 22*l*. 12*s*. judgment was respited at that assizes, because he was sick, and could not be brought up to receive sentence; but he afterwards received his Majesty's most gracious and free pardon. (*i*) Afterwards at the Old Bailey, in Sept. session 1782, he was, together with a comrade of his, convicted again of a robbery on the highway, and again received sentence of death; he was respited; and, in December sessions following, received his Majesty's mercy, on condition of transportation to Africa, during his natural life. Afterwards, viz. on Sept. 17th, 1783, he again received his Majesty's free pardon, and was discharged. Some months after this, viz. in May 1784, this incorrigible villain committed the robbery on the highway, mentioned above, on the *three ladies*, of which he was, after an impudent *alibi* defence, convicted on the clearest evidence; received sentence of death; and was *reprieved* before the judge left the town *!!! (*k*)

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* The *good* effects of this kind of lenity, were felt, in the county where this happened, very early after the said assizes. Three post-chaises were robbed at noon day, in their way to London; and, some time after, a lady in her carriage was robbed at eleven o'clock in the morning. Another was robbed in the day time, within a few yards of her own door. Afterwards three ladies in a post chaise were robbed at one o'clock at noon (Nov. 6th. 1784,) by two highwaymen whom I saw pursued, and heard they were taken, a few miles off, by the pursuers.

(*h*) Page 55. (*i*) Page 56. (*k*) Page 57.

No other reason can be conceived for this, but the total relaxation of discipline, the little consideration that is paid to the peace and quiet of the public, and the almost *certainty* of escape from *death*, with which the minds of robbers are impressed. *(l)*

The public have an undoubted right to look up to the judges of the land for protection and safety; and those laws, which are the birthright of every subject, from the highest to the lowest, ought to be employed in the defence of their persons and properties from violence and outrage of every kind: if this be not the case, every man must stand in dread of perpetual injury; and has a right to complain, in the loudest and strongest terms, of those, who, instead of preventing these disorders, are little better than accessaries * before the fact, to the daily commission of them.

This

——Sævior ense
Parcendi rabies,

so far from deserving the sacred name of *mercy*, is in fact the highest *cruelty*. *(m)*

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* This sentiment is finely touched by our inimitable *Shakespeare*—Measure for Measure, Act I. Scene 4.

FRE. It rested in your grace
To unloose this tyed-up justice, when you pleas'd:
And it in you more dreadful would have seem'd,
Than in Lord Angelo.

DUKE. I do fear, too dreadful:
Sith 'twas my fault to give the people scope,
'Twould be my tyranny to strike and gall them,
For what I *bid them do*; for we *bid this be done*
When evil deeds have their permissive pass,
And not the punishment.

(l) Page 64. *(m)* Page 69.

Though the number of the executed are *comparatively few*, with respect to the numbers that are *condemned*, yet they are *positively many*; so *many*, as to shock the humanity of every man that has not lost all feeling—and this is the consequence of a precarious and uncertain administration of justice; for, were justice invariably and steadily administered, according to the laws, and to the duty of those who are to dispense them—as offences would be *few*, so would executions be *few* also. *(n)*

The cause of all this is one and the same, both in town and country, *viz.* the *uncertainty* of punishment, and the almost *certainty* of *reprieve*. That there are so *many* executed in *London*, is very shocking to be considered; but it is more shocking still to conceive, that, perhaps, not even a *few* of those *many* would ever have suffered, if the multitude of *reprieves* that are granted to far the greater majority of convicts, did not take off the force of the sad examples which are made, so as to leave the chance of life at least *three* to *one* in favour of the guilty. How injurious is this to those who are executed! How monstrous is it to take men's lives away under pretence of example, and yet do this with such a partiality, as to destroy the very end of their sufferings, by so far weakening the force of that example, as to render it void and of none effect! *(o)*

4thly. *The uncertainty of punishment in England is occasioned by the improper lenity of judges and juries.*

Instead of lamenting the multiplicity of our penal laws, we ought rather to lament the occasions of them; which indeed are so frequent, as to make it impossible for society to exist, unless remedies are thought of and prescribed to stop their progress. These remedies, like all others, must be applicable to the diseases which they are to encounter, and be

(n) Page 71. *(o)* Page 92.

faithfully and duly administered, otherwise they can be of no effect, and consequently of no value whatsoever. I may say, that the legislature has from time to time been assiduous in meeting crimes, as they have arisen, with wholesome laws; but those, whose duty and office it is to administer these laws, have now, for many years, been preferring their own *feelings* as *men*, to the duty which they owe the public as *magistrates*; and have been making so wanton and indiscriminate an use, or rather *abuse*, of certain discretionary powers with which they are invested, that safety and impunity invite forth and harden offenders, while danger and distress are every where menacing the innocent. *(p)*

The state of the criminal laws in this land, may soon be said to resemble that of the laws of *Vienna*, as represented by *Duke Vincentio*, in *Shakespeare's Measure for Measure.*

We have strict statutes, and most biting laws,
The needful bits and curbs for headstrong steeds,
Which for these MANY years we have let sleep,
Ev'n like an o'ergrown lion in a cave
That goes not out to prey: now, as fond fathers
Having bound up the threatening twigs of birch,
Only to stick it in their childrens' sight,
For terror, not for use; in time, the rod
Becomes more mock'd than fear'd: so our decrees,
Dead to infliction, to themselves are dead,
And liberty plucks justice by the nose;
The baby beats the nurse, and quite athwart
Goes all decorum. *(q)*

But when such a reader of our laws is told, that offences against those laws, are daily committed—that they are multiplied now, beyond the example of former ages—that no country is so infested with the depredations of robbers of all

(p) Page 14. *(q)* Page 16.

kinds; he would be at an utter loss to account for this, till he was told, that the dispensers of these laws very rarely put them in execution; and therefore, that they were little more than a *scare-crow*, set in a field to frighten the birds from the corn, which at first might be terrible in apprehension, but in a little time became familiar, and approached without any danger, by even the most timorous of the feathered race. *(r)*

Holy writ tells us, that, when Saul the king of Israel had received a positive commission from God to destroy the Amalekites utterly, and all that belonged to them, he executed his commission with such partiality, as to save the Amalekite king, Agag, alive; and the best of the sheep, oxen, and fatlings, and all that was good, and would not utterly destroy them; but every thing that was vile and refuse, that he destroyed utterly. When Samuel afterwards met Saul, Saul expressed himself thus;—"Blessed be thou of the Lord, I have perfor-"med the commandment of the Lord." And Samuel said, "what meaneth then this bleating of the sheep in mine ears, "and the lowing of the oxen which I hear?" *(s)*

Now, if our judges of assize, really execute their commissions as they ought, what meaneth then these numbers of burglaries, highway robberies, these depredations, by day and night, in our roads, streets, houses, fields?—how are our newspapers filled with daily accounts of mischiefs done on the persons and properties of his majesty's subjects, by *felons* of every denomination? *(t)*

Some have said, that a scruple of conscience in *Judges*, prevents the execution of the laws against certain offences—that they think them too severe for the offence, and therefore constantly *reprieve* those who are convicted. But I do not apprehend that this is at all the province of a *Judge*—what-

(r) Page 19. *(s)* Page 33. *(t)* Page 34.

ever laws the parliament sees necessary to enact, the *Judge*, agreeably to his *oath* of *office*, is bound to declare and pronounce; and his standing between the judgment and execution, is taking upon himself, not only to be wiser than the law, but a power, which, if wantonly and causelessly exerted, must render the most important and salutary laws contemptible and useless. — The *Judge*, in such a case as this, sets himself above the law, and presumes to exercise an authority with which the constitution has not intrusted even the crown itself. We all know how a *dispensing power* over the penal laws was attempted in the days of Kings who aimed at arbitrary power, by setting themselves above the laws, and wanting to govern without them; and we also know what this ended in. But where is the difference, between the arbitrary prevention of trial, and the arbitrary prevention of execution?—the *former*, perhaps, may be more glaringly arbitrary, but the *latter* will answer the same end *(t)*.

But to exercise this power of *reprieve* wantonly, and indiscriminately, so as to *save felons* only because they are *condemned*; to defeat the end of the law by a mere arbitrary dispensation of a *Judge*, who, to gratify his *feelings* as a *man*, violates his *oath* and *duty* as a *magistrate*, is to abuse a most salutary power to the most mischievous purposes. It makes void the law; its terror, and therefore its best use, is no more—the * innocent public suffers, the guilty invader of its property triumphs *(u)*.

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* *Tully* defines *pity*, as—"*Ægritudo ex miseriâ alterius injuriâ laborantis*"—"An anxiety, care, or sorrow, (of mind) excited by the misery of another, labouring under injury." If this definition be just, one should think, that the *injured* public, rather than the *injurious* robber, should be the object of the magistrate's compassion.

It was a fine saying of the great and good *lord chief Justice Hale*—"When I find myself swayed to *mercy*, let me remember, that there is a *mercy* likewise due to the country."

(t) Page 47. *(u)* Page 52.

What has been said in the foregoing pages, is more immediately applicable to *Judges* on the circuits. They are the magistrates who are appointed to carry justice into every remote part of England; and on their due execution of their high and important office, the whole country must look for peace and safety: these are what every man has a right to enjoy, as far as the laws can ensure them to him; therefore, to rob those laws of their effect, by a careless, partial, or inadequate administration of them, is a breach of trust of the most dangerous and mischievous kind: notwithstanding this, such an administration of the laws has been long creeping in upon us, as the length of the gaol-calendars, more especially in the home counties, too plainly testify.—I know that many other causes are invented for this; some even lay it upon the laws themselves—but no man has a right to do this, till those laws have been steadily, faithfully, impartially, and uniformly executed in every part of the kingdom. 'Tis this, and this alone, that can deliver us from the dreadful situation to which we are now brought, unexampled in former times—*bad* though *they* might be, still *these* are worse.—The reason of this is, that there is almost an universal want of discipline, a general failure of attention, in our superior magistrates, to the vast importance of punitive justice: this induces the wicked and profligate to become still more so; having so many chances in their favour, they very little concern themselves about *consequences*—or, as a wise King said—"Because sentence against an evil work is not executed speedily—(and we may also say—*certainly*) therefore the heart of the sons of men is fully set in them to do evil." *(a)*

It has been before observed, that some judges have reprieved, for many offences made capital by the law, such as

(*a*) Page 86 to 89.

horse-stealing,* sheep-stealing, and the like, because it is against their *consciences* to take men's lives away for such offences as these. But how do such men's *consciences* dispense with their solemn *oath of office?* they are here brought into a very serious dilemma; they have sworn solemnly to execute the laws, but their *consciences* won't let them do this; what then becomes of their *oaths*, which are given as securities to the public for the due execution of justice? such a judge ought to resign his place, and not trifle thus with the law, with himself, and with his fellow-subjects, in matters of such weighty consequence. *(b)*

It was worthy the understanding and policy of a low thief, to say to judge Burnett, once, at Hertford assizes—"My lord, it is very hard to hang me for *only* stealing a horse."—It was worthy the good sense and wisdom of that learned judge, to answer—"Man, thou art not to be hanged *only* for stealing a horse, but that horses may not be stolen."—This answer I could wish the judges to carry with them, whenever they go the circuit, and to bear it in their minds, as containing a wise reason for all the penal statutes which they are called upon to put in execution: it at once illustrates the true grounds and reasons of all capital punishments whatsoever, namely, that every man's property, as well as his life, may be held sacred and inviolate.—This, thank God! is, in this country,

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* I have just seen a printed *hand bill*, from Chertsey, in the county of Surry, signed by many *gentlemen* and *farmers*, complaining (as well they may) of the *daily increase* of SHEEP and HORSE-STEALING; and offering a reward *of twenty pounds*, to any person who shall be the means of convicting an offender.

This is one of those instances, which prove, how severely these mischiefs are felt by the *public*; as well as how great a cause that *public* has to complain, of those who turn such *miscreants* loose upon their fellow-subjects.

(*b*) Page 102.

the constant care of the legislature, and whoever counteracts this, deprives us of our common birth-right. (*b*)

Suffice it to say, that, if there were the same care taken to execute the laws in the *higher* departments of magistracy, as there is in the *lower*, such a check must be given to the licentiousness of robbers, as soon to bring on a new face of things. We should almost have to say—*redeunt Saturnia regna.* (*c*)

As it is to the purpose of these papers, I would observe, that the *petty juries*, who are to stand between the crown and the prisoners, notwithstanding the solemn *oath* by which they are bound, frequently acquit prisoners, in the very face of the clearest and most indisputable evidence. (*d*)

The oath of a petty juryman is as follows, viz. "You shall well and truly try, and true deliverance make, between our Sovereign Lord the King, and the prisoner" (or prisoners) "at the bar, whom ye shall have in charge, and a true verdict give ACCORDING TO THE EVIDENCE.—So help you GOD."

The words of this solemn adjuration are very plain and intelligible to the meanest capacity, and very clearly point out to the juryman the whole of his duty. They confine his attention to the *evidence* before him, and they bind his conscience to deliver his verdict, simply, according to the conviction which *that evidence* works upon his mind. (*e*)

Instead of this, juries frequently take upon themselves to give verdicts diametrically opposite to the evidence which has been delivered. I have often observed this, with much uneasiness; and, indeed, that man, who can hear *twelve* people *perjure* themselves, and not be affected by it, must, one

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(*b*) Page 105. (*c*) Page 130. (*d*) Page 135. (*e*) Page 136.

should think, be void of all feeling; of all *proper* feeling, at least, whatsoever. *(c)*

For instance. A prisoner is set to the bar, and put upon his trial. The witnesses uniformly, and without a doubt, prove the *fact* against him. But perhaps he happens to be young; it appears to be his first offence; he has, before the fact which is proved against him, had a good character; he was drawn in by others; was in liquor; or some other circumstance of the like kind strikes the minds of the *jury*; they forget their oath; "to give a true verdict according to the evidence;" and take upon themselves to *acquit* the prisoner, against all *fact* and *truth*. This I have so often seen, that I cannot forbear the mention of it. The judge, on this occasion, usually takes little further notice of the matter, than to congratulate the prisoner on "his narrow escape," and to tell him that he has had a very *merciful* jury." *(d)*

That such an acquital as this is owing to the *perjury* of the *jury*, is beyond a doubt: they have given a verdict *according* to their *feelings*, but *against* their *oath*. This may be a very dangerous business to the public; for if a jury can give a *false* verdict in favour of a prisoner in one case, they may also give a false verdict in another, in *prejudice* of the party accused. If through *favour* they acquit, through *prejudice* they may convict*; and if so, their oath, which is to be looked upon as

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(c) Page 137. *(d)* Page 138.

* This I remember to have happened, in a very remarkable case, of a person of fortune, who was *maliciously* indicted for stealing *turkies*, and as *maliciously* convicted, at a certain *general quarter sessions* held in the Borough of *Southwark*. To behold a venerable figure of an old gentleman, above seventy years of age, standing at the bar, as a common *felon*, was, in itself, an afflicting sight—but to see a *jury* capable of convicting him against *law*, as well as

the grand security to the public, as far as *juries* are concerned, is a nugatory piece of form. *(e)*

5thly. *The laws of England are not severe.*

I would be understood to confine myself to the penal or criminal laws; and, however it may be fashionable with many, to find great fault with the number and severity of these, yet I think it our happiness, that, as crimes have arisen, there have been laws made to repress them; nor do I conceive, that any man can reasonably find fault with this, except indeed it be the villain who is the object of them, and who certainly would wish to be free and exempt from all restraint whatsoever.—As to the *severity* of our laws, I know of none but of the most wholesome kind; for it is this alone which can deter the savage minds of those who are the objects of that *severity*, from the commission of those outrages and mischiefs against which the *severity* of our laws is levelled. The regular, sober, and virtuous part of the society has nothing to fear from the *severity* of the laws, but they have much to hope for; they may hope by this to be protected in their persons and properties, and in the secure possession of their lawful rights; for, however the profligate and abandoned assailant may have cast off every humane and virtuous inducement to good, and

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fact, contrary to the sense and direction of the court, was still more afflicting.

It seems, that this old gentleman was a good deal disliked in his neighbourhood; and there being, unfortunately, some of the *jury* literally *de vicineto*, they influenced the rest to find him *guilty*, and to persist in their *verdict*, though sent out of court to re-consider it.

This matter ended in an unanimous petition to our most gracious Sovereign, signed by all the magistrates, expressing their disapprobation of the verdict; which procured a pardon for the *defendant*.

(e) Page 140.

have put on the savageness, fierceness, and cruelty of a wild beast, so as to have forfeited all right and title even to the character of a man—there will be yet some principle of *fear* left, on which the *severity* of our laws are intended to operate, so as to check and prevent the mischiefs he would otherwise commit; or, if he proceeds to the full extent of his wickedness, to fall upon him, as an example to others, who may yet be stopped before it be too late. *(a)*

Whoever examines the *common* and *statute* laws, which respect the criminal jurisdiction to be exercised over offenders of all kinds, must surely acknowledge the watchfulness of the legislative powers, both ancient and modern, over the lives, liberties, and properties of the inhabitants of this country: a stranger, who should read over an accurate and well-digested code of our *crown law*, would imagine us to be the happiest, the securest, and best protected people under the sun, in point of our internal police. He would admire the disposition of the *whole*, as well as the adapting of every *part* for the public good.—No dangerous crime without a prescribed severity of punishment; so contrived, as that the offender has nothing to *hope*; this inducement so precluded, as to leave no encouragement to villainy; in short, he might be led almost to imagine, that the account we have of our safety from thieves and robbers, must be as perfect as in the days before the *Conquest*, when it was said, that "a child might go from one end of the kingdom, to the other, with a bag of money in his hand, without fear of having it taken from him." *(b)*

Revision of our Laws.

I have professedly avoided entering upon the question, how far it might be expedient to revise our penal statutes, relative to capital offences? but, as a friend to examination and revi-

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(a) Page 7 to 9. *(b)* Page 16 to 18.

sal of all kinds, I should not be sorry to hear that such a thing was in agitation, for, if any of the laws in being, fail of their execution, and consequently of their end and purpose, because they are thought too sanguinary, they had much better be altered into something less severe, than to let those offences, which are the objects of them, go without any punishment at all. *(a)*

However, this is a matter wholly for the consideration of the legislature; I shall therefore dismiss it, with my hearty good wishes, that if ever it be done, it may be productive of all that benefit to the public, which the warmest advocates for such a measure can expect or desire: at the same time expressing my own doubts, whether any other human system could equal the present, for the suppression of public injury, supposing the law as it now stands were punctually executed. We then might say———

The law hath not been dead, tho' it hath slept:
Those many had not dar'd to do that evil,
If EV'RY MAN, that did th' edict infringe,
Had answer'd for his deed: now 'tis awake;
Takes note of what is done; and, like a prophet,
Looks in a glass that shows what future evils
(Either now, or by remissness new-conceived
And so in progress to be hatch'd and born)
Are now to have no successive degrees,
But, ere they live, to end.

See Shakspeare's Measure for Measure. *(b)*

(a) Page 133. (b) Page 134.

APPENDIX TO THOUGHTS ON EXECUTIVE JUSTICE.

SOON after the publication of "Thoughts on Executive Justice," a tract appeared, entitled, "*Appendix to Thoughts on Executive Justice, occasioned by a Charge given to the Grand Jury for the County of Surrey, at the Lent Assizes, 1785, by the Hon. Sir Richard Perryn, Knt. one of the Barons of his Majesty's Court of Exchequer.*

"————*immedicabile vulnus*
Ense recidendum, ne pars sincera trahatur."

THE preceding little publication, owed its rise to the most sincere wishes for the public good. It was sent forth, with a desire of awakening, in the minds of THOSE WHOM IT PRINCIPALLY CONCERNED, a very serious attention to the distresses of their fellow-subjects, under their present *increased*, and still *increasing*, state of danger, from *depredation* and *robbery*.—It was intended to lead to *one sad cause* of these, which arose from too great, and indiscriminate an indulgence of those amiable, but ill-timed exertions of lenity and compassion, which had so long been turned into incitements and occasions of evil, in the minds of wicked and profligate men; such, as having abandoned themselves to all manner of wickedness, had so far got the better of every motive and

encouragement to the common duties of humanity, as to make themselves the public terror of all honest and virtuous people. (*a*)

It was intended to recommend such an exertion of *punitive* justice, as *to enforce* that *by example*, which could not be effected by precept—to call in aid the laws of this country, for the security of the innocent and injured public; to lessen the number of crimes, by deterring men from the commission of them; and, by a *certainty* of punishment, to take away those inducements and allurements to evil, which so frequently are derived from a too-well founded *hope of impunity*. (*b*)

It was to shew, that, whatever can induce men to the commission of crimes, must, in the end, bring them to destruction; that, therefore, rendering the punishments of the law *uncertain*, must, by inducing men to commit crimes, in the end bring them to destruction; and that, for this reason, however the reprieving or pardoning convicts might, on the particular instant, bear the semblance of *mercy*, yet it was the highest *cruelty* to all who were encouraged to offend, and thus brought *at last* to *feel*, what they imagined they had little *reason* to *fear*.

That not only those, who had received *mercy*, were induced to go on in their evil courses, but that many were drawn in to venture upon the like, by the hope which they themselves conceived from the impunity of others. (*c*)

That *reprieves* and *pardons* had brought more to the *gallows*, than they had ever saved from it—and that, on this account, as well as on that of the insulted and suffering public,

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(*a*) Page 2. (*b*) Page 3. (*c*) Page 4.

a steady, impartial, dispassionate execution of the laws, must be the only means, by which the public safety can be insured, or the persons and properties of individuals be protected.

In short, the whole, at least the principal arguments in the said publication, may be collected into the small compass of the following syllogisms.(*d*)

1. That system of police is the least likely to prevent crimes, which holds forth an *uncertainty* of punishment.

But our present police holds forth an *uncertainty* of punishment.

Therefore, our present system of police is least likely to prevent crimes.

2. That system, &c. is the most *merciful*, which is the most likely to prevent the commission of capital offences.

But that system which holds forth a *certainty* of punishment, is the most likely to prevent the commission of capital offences.

Therefore, that system, &c. is the most *merciful*. (*e*)

The above contain the principles, and chief arguments of the book: these are illustrated by various anecdotes, by way of examples; and the conclusion to be gathered from the whole is, that the very *police* itself must sink into contempt —the whole kingdom be over-run with *banditti*, and the lives and properties of the sober, industrious, and virtuous part of the community be left in the hands of those, who are the declared and avowed enemies of every principle of law, justice, and even of common humanity.(*f*)

(*d*) Page 5. (*e*) Page 6. (*f*) Page 7.

To step forth, therefore, in the cause of public safety, to apply, in the most earnest manner, to those SUPERIOR MAGISTRATES, to whose care is committed the administration of public justice, and on whose exertions of their great abilities as *men*, as well as of their high and salutary powers as *magistrates*, our ALL must depend, cannot, I should humbly hope, have so unfavorable a construction put upon it, as to ascribe it to any other motive, than to such as becomes, what the author has styled himself in his *title page*, A SINCERE FRIEND TO THE PUBLIC. (g)

It was some pleasure to the *author*, to find, that his little well-meant performance, had been in some measure attended to, by those to whose judgment it had been submitted *, and to whom it had been particularly addressed. It had the honor of being noticed, in the *Charge*, which was delivered to the *Grand Jury*, by a learned and worthy judge, Mr. Baron Perryn, at the late *assizes* for the county of *Surry*. (h)

The *Learned Judge* began his *charge* with a solemnity and decency well becoming his own situation, as well as that of the gentlemen impannelled on the *grand inquest*, who now stood before him.

After some prefatory matter, his Lordship assigned "his first appearance on the *home circuit* as a reason for his wishing to detain them some time longer, than he otherwise might have done, while he acquainted them with his sentiments on the causes of the increase of robberies, and other depredations on the public."(i)

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* The author thought it his duty to send a copy of the pamphlet to each of the twelve judges.

(g) Page 8. (h) Page 9. (i) Page 15.

The *Learned Judge* then observed, that "the *lenity* of the *judges*, and the frequency of *reprieves* and *pardons*, had been assigned, by some, as reasons for the increase of robberies:" he said, that "he was induced to mention this, on account of a late publication, in which the learned author, had laid it down for a maxim, that, except where the evidence was not satisfactory, and in some other instances mentioned in the book, *judges* ought to execute all they convict. This," adds the *learned judge*, "would be making our laws like the laws of *Draco*, which, from their severity, were said to be written in blood." (*k*)

It is no small disadvantage to a work, to be held forth for judgment, as to its real intention, from a mention of a detached paragraph, or of a single and unexplained proposition. From the manner in which the *learned judge* did this, the auditory must conclude, that the *author* must be a very cruel and blood-thirsty person, who wished for laws of the most *sanguinary* kind, to be executed with the most unrelenting severity, wherever the *conviction* of an offender could afford an occasion.—Nothing could be farther from his thoughts! (*l*)

In the first place, I would answer, that no where, throughout the whole book, is the *judge's* power of *reprieve* denied, or found fault with, but where it is exerted *wantonly* and *indiscriminately*, as well as *inconsistently* with the *public good.* Where *judges* indulge their *feelings* as *men*, so far as to forget their *duty* as *magistrates* (in whose hands the administration of justice is placed by the constitution, for the *good of the whole*) there the public suffers in the escape of offenders from punishment—because, this not only tends to the encouragement of those who are already embarked in villainy, but

(*k*) Page 26. (*l*) Page 27.

to draw others in to the commission of crimes, from the hope of *impunity*, which such ill-timed lenity holds forth to them. As to the position itself, "that *judges* ought to execute all they convict, except in a few cases," it stands very fully explained (p. 80.) in the following words. (*m*)

"A *judge*, who can see a fellow creature stand before him, under circumstances of the deepest guilt, and exposed to the severest punishment, without feeling the utmost pity and compassion, must be a *monster in nature*: little better must he be, who does not *gladly* embrace *every* opportunity of shewing *mercy*, where it can be done consistently with the safety and welfare of the public. But, on the other hand, these ought to be uppermost in the *judge's* thoughts; for where *these* are sacrificed, in any degree, it is not *mercy*, but *folly* and *injustice*, to *reprieve*; and such *reprieves*, having, no doubt, brought more to the gallows than they have ever saved from it, are not to be esteemed acts of *mercy*, but are a species of *cruelty*: drawing in men to commit capital offences, under a notion of *impunity*, is very mischievous, not only to the criminals themselves, but to those "who suffer by their outrages," &c. (*n*)

As the laws of *Draco* were mentioned by the learned *judge*, it may be worth our while to consider a little who this Draco was, and what were his *laws*. (*o*)

Draco lived about 623 years before CHRIST, and was *Archon* (Gr. ἀρχων) or *chief magistrate*, at *Athens*. We have but very short and imperfect accounts of this man, but he is said to have punished all things with death; even indolence, or the taking an apple, was as severely punished as

(*m*) Page 28. (*n*) Page 30. (*o*) Page 34.

sacrilege—for which he himself assigned this reason:—"Small faults seem to me worthy of death, and for the most flagrant offences I can find no higher punishment."

As to the laws of England, they must, abstractedly and specifically considered, be just what they are, whether executed or not. It was not possible for the legislature to foresee every event or circumstance, which might appear on the trials of offenders; it is therefore, that the wisdom and discretion of the *judge*, is to remedy the defects of human foresight, and to take care, that the *spirit* and *intent* of the law be duly observed in every case: and I own, I cannot conceive, that executing people, who, by their offences, make it difficult to travel the roads, to walk the streets, to set by our own fire-sides, without danger of being robbed, and perhaps worse; or to turn our horses and other cattle into our fields, without the hazard of losing them; can bring the laws of *England* into the least similitude of a system, which put a man to death for taking an *apple*.

The learned judge then said; "that it had been disputed among *theological* writers, how far the *Jewish* law is repealed, or how far it is lawful to put men to death among *Christians*." (p)

As for *theological* writers and disputants, I have read enough of them, to make me narrow my studies of that sort, to those who, being divinely inspired, can neither lie nor deceive: and indeed, the learned *judge* seemed of the same opinion; for his *lordship* appealed to the scriptures of the *New Testament*, for a proof, that it is lawful, among christians, to put men to death for certain crimes.

(p) Page 37.

The first text his Lordship mentioned, was *Rom.* xiii. 4. "*For he* (the magistrate) *beareth not the sword in vain.*"

The *sword* is an instrument of death, and stands here, metonymically, to denote *capital punishment*; and this sentence, therefore, evidently proves the power of magistrates to put criminals to death, otherwise these magistrates would bear the *sword in vain.*

But one might carry the text farther, and say, that the magistrate bears the *sword in vain* (εικη) *to no purpose*, if laws are not duly put in execution. The whole reasoning of the context implies this.

Ver. 3. *Rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise for the same.*

Ver. 4. *For he* (the ruler or magistrate) *is the minister of God to thee for good: but if thou do that which is evil, be afraid: for he beareth not the sword in vain, for he is the minister of* God, *a revenger* (εκδικος εις οργην — an avenger—to execute wrath or punishment) *upon him that doeth evil.*—A stronger passage cannot be produced, to prove, that it is not only *lawful*, but the *magistrate's* absolute and indispensible duty, to punish offenders according to law: that he is God's minister for this very purpose.

Ver. 5. *Wherefore ye* (christians—even then, living under an heathen government) *must needs be subject—i. e.* to the *laws* of the state—*not only for wrath*—not only with respect to the punishment which will otherwise ensue; *but for conscience sake—i. e.* towards God; who, ver. 1. commands

(q) Page 39. (r) Page 40. (s) Page 41.

every soul to be subject to the higher powers, and, of course, to obey the laws.

The other text, mentioned by the *learned judge*, was Acts xxv. 11. where the apostle *Paul* says, before *Festus*, the *Roman* governor, at his judgment-seat—"*If I be an offender, or have committed any thing worthy of death, I refuse not to die.*" This text is also much to the purpose, and justifies our reformers in declaring—"Art. 37. Of the civil Magistrates"—that the laws of the realm may punish christian men with DEATH, for heinous and grievous offences. (*t*)

His *Lordship* next introduced the character of *our Saviour*, as furnishing an example of meekness, lowliness, compassion, and mercy; which he seemed to do, by way of a gentle reproof to the *author* for finding fault with the lenity of the *judges*, in granting *reprieves* so often to convicts. His *Lordship* spake, on this point, with a reverence and seriousness that did him honour; and, as an instance of the pity and forbearance of the "*Blessed Jesus*" (as his Lordship expressed himself) he mentioned the case of the *woman* taken in *adultery*, whom the Pharisees brought to Christ. But if we examine that passage, we shall find, that, *our Lord* was not sitting as a *judge*: this was a character which he never bore on earth—so far from it, he renounced it, both as to *civil* and *criminal matters*. See Luke xii. 14. John viii. 15. & xii 47.

If we would see him as a *judge*, we must look upon him, as exalted to the right hand of GOD, where he will sit at the last day, as the great judge of quick and dead.—*He then will judge the world in righteousness, and the people with equity.* Ps. xcviii. 9. Comp. Acts xvii. 31. *He will render unto every man according to his deeds*, &c. See *Rom.* 11. 6. 12. Happy

(*t*) Page 41.

would it be for the *judges* of the *earth*, as well as for the *people* of the *earth*, if all *magistrates* would set before them he character of CHRIST as a *judge;* the laws would then be duly honoured, and the majesty of government duly preserved; for the *certainty* of punishment would make men fear to offend. They fear little of what is to come, because they don't believe it; but what they see before their eyes, must strike them with terror. (*a*)

As to the case of the woman taken in adultery, which we find recorded, John viii. 3, 11. She was brought before CHRIST by her accusers, not for the sake of *justice*, but with a malicious design against CHRIST Himself, as we may learn from ver. 6. where it appears, that, all they said on the occasion, was merely *to tempt our* LORD, to try whether they could not have something * to accuse him of, either as presuming on an authority against the *Roman* government, if he condemned her, or against the law of *Moses*, if he did not; but he defeated their malice, and escaped the snare, by leading her accusers into a condemnation of themselves, insomuch that they departed self-convicted, and left the woman. Then JESUS, who came not to *condemn the world*, nor to exercise a judicial power in punishing criminals—but even in this very instance renounced it; dismissed the woman, with a caution, which doubtless looked farther than the present life. Comp. John, v. 14.

On this case I would humbly propose two questions;

1. What it has to do, one way or other, with a *repeal* of *Jewish law*?

2. What precedent can it possibly afford, for a *judge* to turn three-fourths of the capital convicts upon the public? (*b*)

* Comp. Matt. xxii. 15. and Luke xx. 20—23.

(*a*) Page 44. (*b*) Page 46.

As to the imitation of CHRIST, it is not only the *duty*, but the great privilege of CHRISTIANS. He left them an *example that they should follow his steps*; and it is their glory so to do; in nothing more than in the *forgiveness* of *injuries*. He could, in his very last *agonies* upon the *cross*, pray for his *persecutors* and *murderers*. He could even, as it were, *palliate* their offences, by pleading their ignorance, instead of aggravating it, by reproaching them with their malice. "Father forgive them! they know not what they do!" said the DYING JESUS. His whole life was a pattern of meekness, gentleness, love, and forbearance. "Lord," *said Peter, how oft shall my brother sin against me, and I forgive him?—— until seven times?* JESUS *saith unto him, "I say not unto thee, until seven times, but until seventy times seven."* OUR LORD was a bright example of his own precepts; and we are told, 1 John, ii. 6. that, *he that saith he abideth in* HIM, *ought himself also to walk, as* HE *also walked.*

Such are the precepts, which must be looked upon as commentaries on the divine law, that saith, *thou shalt love thy neighbour as thyself.* They are the golden rules by which all *christians* ought to walk. The king and the subject, the prince and the beggar, the judge and the prisoner, are here all alike concerned; *for there is no respect of persons with* GOD. (*c*)

His Lordship then concluded, with saying, that, "if judges were expected to execute the law upon those who were convicted, the grand jury ought to be very cautious, how they exposed people to a trial by finding bills against them; that they should find no bill unless the evidence before them was sufficient to convict the prisoner, supposing it proved at the bar, and uncontradicted by the prisoner's witnesses." (*d*)

(*c*) Page 48. (*d*) Page 52.

I have almost forgotten to mention one more observation of the learned *Judge*, which was, on "the number of sanguinary laws, in our statute books, some of which, his lordship observed, were of long standing, others of more recent date, and" (adds his lordship) "the only reason I can assign for these laws being either suffered to remain from old time unrepealed, or being more recently enacted, is, that the legislature trusted to the discretion of the judges as to their execution." (*e*)

I do not pretend to give his *Lordship's* exact words, either in this, or in any other quotation from *the Charge;* but I hope, that neither here, nor elsewhere, have I mistaken or misrepresented what was said.

I must confess, that my apprehension is at a loss to conceive the idea of the *legislative* power of a country, enacting a law for any *purpose* whatsoever which they do not mean to be executed. That they should enact laws, with an intent that the executive power might suspend their operation, appears to me to be giving themselves a very needless *trouble*, which might have been *spared*, by not enacting such laws at all. (*f*)

The word *sanguinary* carries with it a very dreadful meaning, like its plain-English *synonymy—bloody*:—it brings sensations into the mind of the most terrible nature; and, when applied to laws, it imports, that they are arbitrary and cruel, like the laws of *Draco*, which were calculated for the destruction and misery, not for the preservation and happiness of mankind. (*g*)

A law may be *severe*, without deserving the name of *sanguinary;* and though the *former* may be justly applied to some of our penal statutes, yet the *latter* never can. A law

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(*e*) Page 53. (*f*) Page 54. (*g*) Page 55.

which has for its object, and is therefore calculated to promote, the security of peaceable and virtuous people, may justly be styled a *merciful* law, as it regards the *whole*, though severe in its punishment of offenders; and, if without such *punishment*, the *good of the whole* cannot be secured, and promoted, this must arise from the audacity and profligacy of those enemies to their fellow-subjects, who will not be intimidated by gentler methods, and who therefore bring upon themselves that *wholesome severity*, which is to make them examples of public justice, that others may fear to offend. (*h*)

As to leaving the execution or non-execution of statutes to the disposal of the *judges*, it is ultimately resorting to the fancy or will of individuals, and bringing us to the—*Misera servitus, ubi jus est vagum aut incognitum.* Who can attempt to say, what the consequence of *offending* may be, when, instead of deducing, or apprehending, the *consequences* from the words, and plain meaning from the *law itself*, they are to be suspended, on the uncertainty of private determination? (*i*)

(*h*) Page 56. (*i*) Page 57.

OBSERVATIONS UPON THOUGHTS ON EXECUTIVE JUSTICE.

Published in the Year 1786.

Nunquam aliud natura, aliud sapientia dicit.

Criminal jurisprudence has, within the last twenty years, become a very popular study throughout Europe, and the cultivation of it has been generally attended with very sensible and very beneficial effects. In proportion as men have reflected and reasoned upon this important subject, the absurd and barbarous notions of justice, which prevailed for ages, have been exploded, and humane and rational principles have been adopted in their stead. That criminal prosecutions ought always to be carried on for the sake of the public, and never to gratify the passions of individuals; that the primary object of the legislature should be to prevent crimes, and not to chastise criminals; that that object cannot possibly be attained by the mere terror of punishment; and that unless a just proportion be observed between the various degrees of crimes, in the penalties appointed for them, the law must serve to excite, rather than repress guilt; are truths so generally received, that they are come to be considered almost as axioms of criminal law. But considerable as has been the progress of these principles in other parts of Europe, they have not yet produced in this country any melioration of the system of our penal laws. The most glaring defects in those laws have not escaped observation, but few have attempted to remove them, and none have been successful in their attempts; and the only beneficial effect which has yet been produced in England, is a desire in the crown, and in its ministers, the judges, to

remedy some of those defects by their mode of executing the laws, and particularly by a mitigation of that indiscriminating severity, which, while it inflicts the same punishment on a pickpocket as on a parricide, confounds all ideas of justice, and renders the laws, objects, not of veneration and love, but of horror and aversion. A more permanent and a more certain correction of those defects would be so great a national benefit, as one would have thought every good and reflecting citizen must ardently have wished for. At least one would have supposed that humanity, as well as patriotism, must have forbidden any endeavours to cloud the prospect of such a reformation, and much more any efforts to lay restraint upon the sovereign, in executing, according to his oath, justice in mercy, and to enforce that *summum jus*, which, where the laws are such as constitute the criminal code of England, must ever prove *summa injuria*. (a)

This ungrateful task, however, has been lately undertaken, and an attempt has been made to restore the law to all its sanguinary rigor, by the author of *thoughts on executive justice, with respect to our criminal laws*; a work proceeding on principles, which are now so little prevalent, and breathing a spirit so contrary to the genius of the present times, that I should have classed it amongst those performances, with which every literary age has been infested, and which are calculated to render the authors of them celebrated only for the singularity of their opinions, and should have therefore left it to sink into that oblivion, to which such compositions seldom fail to be soon consigned, had I not found that the warmth and the earnestness of the writer's style had gained him converts, and that some of the learned judges, to whom his work is addressed, had seemed inclined to try the terrible ex-

(a) Page 5.

periment which he recommends. Errors which produce such effects are not to be despised as harmless; and it is the duty of every man, who has the use of reason, and who sees their fallacy, to expose and to refute them. (*b*)

What the author's motives in writing were, God and himself only know: I would fain persuade myself, that they were not such as I have already alluded to; that he has a just claim to the title which he assumes, of "a sincere well-wisher to the public;" and that he entertains no particle of doubt about the truth and justice of the opinions, which he has ventured to publish: and yet something more even than this seems necessary, before a man hazards the promulgation of such rigid doctrines to the world; and that he should not only know himself to be sincere, but believe himself to be infallible: for who, that thinks he is liable to error, can venture to propose a scheme, which, if it be erroneous, will have wantonly deprived the state of many subjects, and turned loose upon the unpitying world a miserable troop of widows and of orphans? An experiment, which is made at such a cost, ought hardly to be tried while there remains a possibility that it may fail of success. There are some opinions, which men fondly persuade themselves are truths, and truths important to mankind, which are, however, of such a nature that no man should dare to propound them, who is not ready to prove his sincerity by offering himself a martyr in their cause. If a legislator propose laws, like those of Draco, written in the blood of his fellow-citizens, he must seal them with his own, like Lycurgus, if he would escape the reproach of cruelty. (*c*)

That the author of the *thoughts on executive justice* had an inflexible confidence in the truth of his doctrines, might have been charitably supposed, if he had supported them only by

(*b*) Page 7. (*c*) Page 9.

cool and dispassionate arguments. But what are we not compelled to think, when we see him availing himself of all the most specious colorings of rhetoric, and employing the strongest hyperboles *, and the most exaggerated descriptions †; at one time artfully and eloquently summoning to his aid the fears of his timid readers, and at another kindling the rage and indignation of what he calls the "poor, oppressed, and innocent public;"‡ when we find him adopting that ferocious language, with which, in more barbarous times, attorney-generals have sought to daunt the miserable state-prisoners, through whose blood they were to wade to their disgraceful honors: when we hear him exclaiming, that "the lurking foot-pad lies, like a dangerous adder, in our roads and streets, and the horrid burglar, like an evil spirit, haunts our dwelling-houses, making night hideous §;" and when we find him attempting, as it were, to intimidate every man from questioning his doctrines, and throwing out the anticipating reproach, that none "can reasonably find fault with the laws, but the villain, who is the object of them ‖?"

But, without examining into this writer's motives, or farther commenting upon the manner in which he has executed his design, I shall venture, even at the risk of encountering the black imputation which he seems to think should light upon the man, who presumes to call in question the perfection of

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* No man can stir out a mile from his house without an apprehension of being robbed, and perhaps murdered." *Thoughts*, &c. p. 73. 1st. edit. p. 77. 2d. edit. See too p. 4.

† Ibid. p. 5. *Appendix*, p. 62. 63, 1st. edit. p. 241. 242. 2d. edit.

‡ *Appendix*, p. 3. 59, 1st edit. p. 181. 238, 2d. edit.

§ *Thoughts*, &c. p. 14. ‖ *Thoughts*, &c. p. 7.

our laws, to dispute both the positions which he has sought to establish. *(e)*

He first asserts, that the penal laws of this country are excellent *, and that they have no severity but of the most wholesome kind †; and this serves as the foundation of that proposition, which is the capital object of his work, namely, that those laws ought to be strictly executed, so that the certainty of punishment may operate to the prevention of crimes. If the former of these positions were true, no man of common understanding could dispute the latter; for, if laws be perfect, they ought undoubtedly to be religiously observed; but, if our laws, instead of being excellent, should appear to be, as it is easy to demonstrate that they are, in many instances, unreasonably severe, and such, as that the punishment bears no proportion to the crime, it must surely follow, that the strict execution of them is neither expedient nor even possible. *(f)*

In order to judge of the good sense and propriety of this writer s doctrines, it will be necessary, in the first place, to take a view of those laws, which are the subject of his panegyric, and which, he tells us, "he doubts whether any other human system could equal, for the suppression of public injury." ‡ To descend to minute particulars would be putting the patience of my readers to a too severe, and an unnecessary trial; for a very transient view will suffice to discover the absurdity and inhumanity of the system, if that name can with any propriety be given to a mass of jarring and inconsistent laws, which are severe where they should be mild, mild where they should be severe, and which have been, for the most part,

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* *Thoughts*, &c. p. 2. §. 16. 17. † *Ibid.* p. 8.

‡ *Thoughts*, &c. p. 133, 1st. edit. 139, 2d. edit.

(e) Page 13. *(f)* Page 14.

the fruits of no regular design, but of sudden and angry fits of capricious legislators. *(g)*

In entering upon this task, the first thing which strikes one, is this "melancholy truth, that, among the variety of actions, which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death *." When we come to enquire into the nature of the crimes of which this dreadful catalogue is composed, we find it contain transgressions, which scarcely deserve corporal punishment, while it omits enormities of the most atrocious kind. We find in it actions, to which nothing but the terror of some impending danger to the state could ever have given a criminal appearance †, and obsolete offences, whose existence we learn only from those statutes, which are still left standing as bloody monuments of our history, though the causes which gave rise to them have long since ceased ‡. On the one hand, we see the invasion of a man's property, though but to a small amount, and unaccompanied by violence, treated as the greatest of all enormities. To steal a

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* 4 Blackst. Com. 18. The number of felonies has been considerably increased since that author wrote.

† 35 Eliz. c. 1. § 3. 35 Eliz. c. 2. § 10. 39 Eliz. c. 17. It is to such laws as these that one may apply the observation of my lord Bacon, that, "there are a number of ensnaring penal laws which lie upon the subject; and, if in bad times they should be awaked and put in execution, would grind them to powder." *Proposal for amending the laws.*

‡ See 43 Eliz. c. 13. 27 Eliz. c. 2. 9 Ann. c. 16. 9 Geo. 1. c. 22.

(g) Page 15.

sheep or a horse, to snatch a man's property out of his hands and run away with it, to steal to the amount of forty shillings in a dwelling house, or to the amount of five shillings privately in a shop, nay, to pick a man's pocket of the value of only twelve pence farthing ‖, are all crimes punishable with death. On the other hand, for a man to attempt the life of his own father is only a misdemeanor: to take away another's life, and to brand his name with ignominy, by a premeditated perjury, is not considered as murder, nor thought deserving a capital punishment *: to stab another, under circumstances of the blackest malice, if the unfortunate object should, after a long and painful illness, recover of his wound only to breathe out the rest of his days in torment and disease, is punishable only by fine and imprisonment: to burn a house, of which the incendiary happens to have a lease, though it be situated in the centre of a town, and consequently the lives of hundreds are endangered, is liable to no severer punishment †. If we look into the legal definition of crimes, we discover still grosser inconsistencies: we find, that under certain circumstances a man may steal without being a thief, that a pickpocket may be a highway robber, a shoplifter a burglar, and a man who

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‖ 8 Eliz. c. 4. 2 Hale's P. C. 366. * Foster 131.

† It has sometimes happened, that a man, who has committed a very atrocious crime, has been hanged for a circumstance attending the perpetration of it which was perfectly innocent. Thus a servant, who had attempted to murder his master, by giving him fifteen wounds upon the head, and different parts of his body, with a hatchet, was convicted, and executed, not as an assassin, but as a burglar, because he had been obliged to lift up the latch of his master's door to get into his chamber. Hutton, 20. Kel. 67.

has no intention to do injury to the person of any one, a murderer: that to snatch a watch out of a man's pocket in the street is a highway robbery *: that to steal fruit ready gathered is a felony: but to gather it and steal it is only a trespass †: that to force one's hand through a pane of glass, at five o'clock in the afternoon, in winter, to take out any thing that lies in the window, is a burglary, even if nothing be actually taken; though to break open a house with every circumstance of violence and outrage, at four o'clock in the morning, in summer, for the purpose of robbing, or even murdering the inhabitants, is only a misdemeanor: that to steal goods in a shop, if the thief be seen to take them, is only a transportable offence; but, if he be not seen, that is, if the evidence be less certain, it is a capital felony, and punishable with death: that, if a man firing at poultry with intent to steal them, inadvertently kill a human being, he shall be adjudged a murderer, and suffer death accordingly ‡. Such are the laws which we are told "a stranger cannot read without imagining us to be the happiest people under the sun, or without admiring the disposition of the whole, as well as the adapting of every part to the public good §." Such are the laws which the judges are exhorted to enforce with the utmost rigor, and which are represented as requiring no revisal ‖,

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* At the Sessions held at the Old Bailey in last July, a child was tried for this species of highway robbery, committed upon a porter: the fact was proved beyond all doubt, and the jury acquitted the prisoner.

† 3 Inst. 109. 4 Rep. 19. b. Yelv. 34.

‡ 3 Inst. 56. Kel. 117. § *Thoughts*, &c. p. 16.

‖ The author of the *Thoughts*, says, it is true, that "as a friend to examination and revisal of all kinds, he should not be sorry to hear, that a revisal of our penal statutes was in agitation, because it is better that the laws should be altered into something less severe, than not be executed" as they now stand; that is, of two evils it

notwithstanding those laws themselves thus proclaim their own absurdity, and call aloud for reformation. *(h)*

It will be unnecessary for me, however, upon the present occasion, to speak of the defects of those laws, any otherwise than as they are unreasonably severe; for it is that defect alone which can be remedied by the execution of the laws; and, in treating of that defect, I shall not, with the Marquis of Beccaria, and the many writers who have adopted his humane principles, contend that the punishment of death ought not, and cannot legally be inflicted by the legislature for any crime committed under any circumstances; but this appears to me abundantly clear, that death cannot be inflicted for a mere invasion of property, consistently with reason and justice, nor without a gross violation of the laws of nature *, and the precepts of our religion. Between a sum of money and the life of an individual, there is no proportion, or, to speak more accurately, they are incommensurable. This observation has been sometimes made with a kind of compassionate triumph over the folly and ignorance of our barbarous ancestors, who punished the crime of murder by a fine, payable to the king, and to the relations of the deceased †; and yet we

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is best to chuse the least: but at the same time he intimates it as his opinion, that no good could come of such a revisal. See p. 132, 3, 4.

(*h*) Page 24.

* *Lex jus necis non habet in omnes cives ex quovis delicto, sed demum ex delicto tam gravi ut mortem mereatur.* Grot. de jure bel. lib. 2. c. 1. § 14.

† *Les attentats contre la vie d'un homme ont été jugés, avec raison, les plus contraires au but de la société, & ont été punis avec la plus grande rigueur chez toutes les nations policées. Il ne convenoit qu'à des barbares de se jouer de la vie de l'homme, en la compensant avec de l'argent.* Principes de la legislation universelle: Amsterdam, 1776. tom. i. p. 168.—*Ce n'est que la férocité & l'ignorance de nos*

surely have far more reason to blush than to triumph, since the same observation applies much more forcibly to the laws subsisting in this enlightened, and, as it is called, this philosophical age. *(i)*

All punishment is an evil, but is yet necessary, to prevent crimes, which are a greater evil. Whenever the legislature therefore appoints for any crime, a punishment more severe than is requisite to prevent the commission of it, it is the author of unnecessary evil. If it do this knowingly, it is chargeable with wanton cruelty and injustice; if from ignorance, and the want of a proper attention to the subject, it is guilty of a very criminal neglect. If these principles be just, the legislature of Great Britain must, in one or other of these ways, be culpable, unless it be impossible to prevent theft by any punishment less severe than death. The author of the "*Thoughts on executive justice*" seems to think, that it is impossible, and that these severities are therefore to be justified on the ground of necessity. But experience shews the erroneousness of this opinion, because in several European states, where the punishment of death is never inflicted but for the most atrocious crimes, these lesser offences are very rare; while in England, where they are punished with death, we see them every day committed ‡; and when, in the reign of Henry the eighth, so many criminals were executed, that their numbers were computed to amount to two thousand eve-

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barbares ancêtres, qui a pu imaginer de mettre un taux à la vie de l'homme, & de convertir le châtiment dû au meurtre, en amendes pécuniaires évaluées on bétail. Ibid. p. 191.

‡ The reason, it will be said, is because the laws in England are executed; but it is inseparable from the nature of too severe laws that they should not be executed. *Draconis leges, quoniam videbuntur impendio acerbiores non decreto jussoque; sed tacito illiteratoque Atheniensium consensu obliteratæ sunt.* Aul. Gell. lib. 11. c. 18.

(*i*) Page 27.

ry year, crimes seem to multiply with the number of executions. "So dreadful a list of capital crimes," says Mr. Justice Blackstone, after having lamented that they are so numerous, "instead of diminishing, increases the number of offenders." ‡ Nor is this a phenomenon very difficult to be accounted for: in proportion as these spectacles are frequent, the impression which they make upon the public is faint, the effect of the example is lost, and the blood of many citizens is spilt, without any benefit to mankind. But this is not all; the frequent exhibition of these horrid scenes cannot be indifferent: if they do not reform, they must corrupt. § The spectators of them become familiarized with bloodshed, and learn to look upon the destruction of a fellow-creature with unfeeling indifference. They think, as the laws teach them to think, that the life of a fellow-citizen is of little value; ‖ and they imagine they see revenge sanctified by the legislature, for to what other motive can they ascribe the infliction of the severest punishments for the slightest injuries? And, where the moral character of a people is depraved, crimes must be frequent and atrocious. *(b)*

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‡ 4 Blackst. Com. 18.

§ *Carnifex, & obductio capitis, & nomen ipsum crucis, absit non modo a corpore civium Romanorum, sed etiam a cogitatione, oculis, auribus. Harum enim omnium rerum non solum eventus atque perpessio, sed etiam conditio, expectatio, mentio, ipsa denique, indigna cive Romano atque homine libero est.* Cic. pro C. Rabirio, 5.

‖ How different was the policy of the Roman republic! The life of a citizen was there thought so valuable, that to put him to death was almost a parricide *(propè parricidium necare);* and the act of saving a life so precious was rewarded with one of the noblest honors of the republic, a civic crown. Can one be surprised that policies so unlike have produced such contrary effects? that at Rome every bosom glowed with patrotism, and that at London public virtue is become a jest?

(*b*) Page 32.

But even were it proved, that no other laws than those which teem with death are effectual to prevent these lesser crimes, it would not therefore follow, that the legislature is justified in enacting such laws. "Though the end of punishment be to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate, and by any means*." If the offence be such that the mischief of it is not of equal consideration with the life of a man, it will be a very poor apology indeed for these solemn murders, to say, in the words which this writer adopts, that "the terror of the example is the only thing proposed; and that one man is *sacrificed* to the preservation of thousands."† For, if he, who is guilty in but a small degree, may be made a victim to the public by being subjected to punishments, to which his offence bears no proportion, why may not he, too, who is perfectly innocent, be sacrificed on the same altar of the public, whenever such an expiation shall be thought requisite? what principle can be urged in support of this doctrine which would not have completely justified the high priest, Caiaphas, when he declared of the most virtuous of men who stood without reproach, though a host of enemies were leagued against him, "that it was expedient that one man should die for the people, and that the whole nation perish not?‡" and who are those *thousands*, for whose preservation this sacrifice is to be made? if they be those whom the example may possibly deter from committing the same crimes, which would

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* 4. Blackst. com. 10.

† *Thoughts*, &c. p. 121, 1st. edit. 128, 2d. edit.

‡ St. John, chap. xiv. 49 & 50. Upon which passage Grotius has this observation: *Descriptio ingenii ejus generis, quos vulgo politicos vocant, qui, honesto atque justo insuper habito, nihil præter utilitatem spectant, nec aliud in ore habent.* Annot. in lib. Evang. 959.

lead to the same fate, the argument is fallacious, and takes for granted the very point in question, the necessity of punishing those crimes with death. *(a)*

We are told, however,§ that the law being of public notoriety, those who incur its penalties do it voluntarily, and have therefore no reason to complain. But before this doctrine was advanced, it ought surely to have been proved, that justice and morality are matters of positive institution; for otherwise, how is a law the less unjust for being universally known? if the *fiat* of any earthly legislators can establish rules of morality, what right had the poor Muscovite to complain, who was executed for wearing his beard, when the law had prohibited that rude but natural ornament? or why should the miserable Japanese murmur, when he is put to a cruel death for having risked a few pieces of silver at some game of chance? *Jam vero illud stultissimum existimare omnia justa esse quæ scita sint in populorum institutis aut legibus.* ‖ If laws operate in violation of the feelings and understandings of men, they are unjust and unwise, by however legitimate an authority they were enacted; if they be repugnant to the character of a nation, they must remain unexecuted, by whatever regulations they are sought to be inforced. *(b)*

Or were the doctrine true, that no man, having full notice of a law, has a right to complain of the severity of the punishment which he suffers, in consequence of his having violated that law, it would still be inapplicable to the people of this country; for, though all our laws may certainly be known, and may perhaps be understood, by those who have leisure,

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§ *Thoughts, &c.* p. 117, 1st. edit. 124, 2nd. edit.

‖ *Cic. de leg.* lib. i. c. 15.

(*a*) Page 35. (*b*) Page 38.

capacity, and inclination to apply themselves seriously a industriously to so laborious a study; yet they as certain are not, and cannot be known to the vulgar,* to whom th knowledge is most important; because it is the hardy crim which want and ignorance suggest, that are chiefly the obje of criminal laws; and not those timid and subtile fraud which are the fruits of a refined education, and of artifici desires; though both are alike injurious to individuals ar pernicious to society. It is true, that every year an immen volume of statutes is printed and publicly sold; but it mig as well not exist, for the multitudes throughout the kingdon who have not money to purchase it, time to peruse i or capacities to understand the technical and my terious language in which it is composed. † Oth

* Anciently, at the end of every session of the parliament, a the statutes which had been enacted in it, were transmitted to th sheriff of every county in England, together with a writ, commar ding them to promulgate those statutes throughout their bailiwicks and the sheriffs, in obedience to this writ, caused the statutes to b proclaimed at their county courts; but some time after the inven tion of printing was brought into England, this practice was dis used, and the statutes have never since been promulgated by an other means than by printing. (4 Inst. 26.) And yet, till the 5t year of the reign of Queen Anne, those who could read, and wh consequently might be presumed to have knowledge of the law were only burned in the hand for crimes which were punished wit death in those who could not read, and who might therefore wel be supposed ignorant of the law.

† "There is such an accumulation of statutes concerning on matter, and they so cross and intricate, as the certainty of la is lost in the heap." *Bacon, proposal for amending the lawes.*— "This continuall heaping up of lawes, without digesting them, maketh but a chaos and confusion, and turneth the lawes many times to become but snares for the people, as was well said, *Pluet*

statutes indeed are heard of while they are only in agitation, and during every stage of their passing into a law; but it is far otherwise with penal acts; for, agreeably to the genius of modern politics, which estimate property far above life, though scarce a tax bill escapes solemn and repeated discussions in parliament, yet every novice in politics is permitted, without opposition, to try his talents for legislation, by dealing out death among his fellow-creatures; and laws of this kind commonly pass as of course, without observation or debate. Having thus stolen into existence, they lie dormant in the statute book, till they are notified to the world by the execution of some unthinking wretch, who, to his utter astonishment, finds himself by law adjudged to die. Though even this can hardly be considered as a promulgation of the law; for who has curiosity or leisure to enquire what has been the crime of every individual among the multitudes that are executed? Let me not, however, be supposed to accuse either those who make, or those who execute the laws, of any design to conceal them from the people. Their only crime, undoubtedly, is gross neglect; but at the same time one is forced to confess, that negligence in legislators or governors is often as baneful as the most active tyranny. No matter whether ingenious malice inscribe laws in small characters, and upon tablets which the eye can scarcely reach; or negligence couch them in unintelligible language, and plunge them into a voluminous farrago of legislation;

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super eos laqueos; non sunt autem peiores laquei, quam laquei legum." *Bacon. Speech on a motion concerning an union of laws.* —How much this accumulation and intricacy has been increased since the time when Sir Francis Bacon wrote, may be conjectured from this single circumstance, that all the statutes prior to his time are comprised in two volumes, whereas those which have been passed since are hardly contained in eleven.

since, in both cases alike the people are left in a fatal ignorance of those rules, by which they are bound to regulate their conduct.

The maxim, that ignorance of the law shall not excuse, may perhaps be justified on the ground of necessity; for very few criminals could possibly be convicted, if it were first requisite in every case to prove, that they had actual notice of the law: but yet those who have been frequently present at the trials of prisoners, must have had occasion to observe, that the presumption on which this maxim is founded, is often contrary to fact. *(b)*

The writer of the pamphlet, however, gives himself little pains to prove the efficacy or the necessity of those severe punishments, which he so much approves, but contents himself with observing that, "the regular, sober, and virtuous part of society has nothing to fear from the severity of the laws, but they have much to hope for." ‡ The same observation might be used with equal force, to take off the edge of men's indignation against the torture, in those countries where it still forms an essential part of the criminal procedure: for the regular, the sober, and the virtuous are little likely to be ever stretched upon the rack. It might be employed to dissuade men from anxiously and strenuously asserting their right to the trial by jury; since the lives, the liberties, and the honor of the sober and virtuous very rarely depend upon a verdict of their peers. There had been much more truth, however, in the observation, if the writer, in lieu of those fine epithets, the *regular*, the *sober*, and the *virtuous*, had said, the *wealthy* part of society has

‡ *Thoughts*, &c. p. 8.

(b) Page, 45.

nothing to fear from the severity of the laws. To cheat a man of his whole estate at play, to murder his peace of mind by seducing the affections of his wife, to bring down the grey hairs of age with sorrow to the grave by debauching a beloved and only daughter, to sell a nation's dearest interests for a breath of popularity, or for the prostituted smiles of a minister, * though they are some of the blackest crimes which disgrace human nature, will never lead the authors of them to answer before a criminal tribunal. And yet to hear this writer's indignant exclamation against the monstrous wickedness of the "barbarous and injurious villains, †" who destroy our horses or our sheep, and his lamentations over the condition of the "poor, oppressed, violated, and innocent public," one would suppose he imagined there could be no guilt, but what leads to the bar of a court of justice, no crimes but those which are often prompted by indigence and necessity, or by an involuntary sloth and ignorance. (*a*)

Ut, quo quisque valet, suspectos terreat ; utque
Imperet hoc natura potens, sic collige mecum.
Dente lupus, cornu taurus petit ; unde nisi intus
Monstratum? Scævæ vivacem crede nepoti
Matrem ; nil faciet sceleris pia dextera: mirum
Ut neque calce lupus quemquam, neque dente petit bos.
Sed mala tollet anum vitiato melle cicuta.

Nor can it be true, till the judgments of men become infallible, that the most regular, the most sober, and the most virtuous have nothing to dread from the severity of the laws ; since, even in this country, where the writer seems to think the

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* *Fures privatorum furtorum in nervo atque in compedibus ætatem agunt : fures publici in auro atque in purpura.* Cato apud Aul. Gell. lib. xi. c. 18.

† *Thoughts*, &c. p. 39. note, 1st. edit. p. 42. note, 2d. edit.

(*a*) Page 49

prevailing mode of trial so unreasonably favourable to the pris ner,* men have been executed for crimes of which they were perfectly innocent. But were it proved that wrong judgments are impossible, and that the guilty alone can fall under the animadversion of the law, I would still deny the consequence which the obs rvation implies, and would quote upon this author the sentiment which he himself professes to adopt, *humani nihil alienum*. The worst criminal is still a man, and as such, entitled to justice; the most irreproachable judge is no more than man, and therefore may at some time stand in need of mercy. (*a*)

The writer has taken pains to collect together a great variety of instances of villains having abused the royal mercy; and he does not seem to have found one solitary instance of a man's having been reclaimed by pardon, and saved from an ignominious death to become a useful and a worthy member of society. Nor would it be very surprising if he knew of no such instance; because, in the history of the vulgar, as well as of the great, it is the daring and the profligate who make the most conspicious figure. The crimes of the highwayman, and of the conqueror, of Cæsar, and of Cartouche, command the notice of mankind; while no regard is paid to the virtue, of the peaceful patriot, or of the industrious mechanic, who who never step out of the

Secretum iter, et fallentis semita vitæ. (*b*)

The reformed thief, who sincerely resolves to atone for his past crimes by his industry and by the regular performance of all his social duties, from the moment he forms that resolution, ceases to attract the public attention. It does not fol-

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* See particularly his arguments against rejecting the testimony of accomplices, unsupported by other evidence.

(*a*) Page 51. (*b*) Page 52.

low, therefore, because the writer has found no such instance, that many do not exist. One has lately appeared, where one would last have sought for it, even at the Old Bailey. In the year 1782, a man was convicted of a robbery, and was condemned to die; but, as there appeared in his case some favourable circumstances, his sentence was mitigated, and he was sent for seven years to work upon the Thames. In last May, however, he was again arraigned at the bar of the court for having been found at large before the term of his punishment had expired, and was again condemned to die. And what, the writer of the *Thoughts* will probably exclaim, can be said in favour of so incorrigible a villain?—The facts proved upon his trial, and which are these: the moment he had escaped from the lighter, he addressed himself to a watchmaker, whom he entreated to teach him his business: the request was granted; and the fugitive applied himself to his new trade with such indefatigable assiduity, that in a few weeks he gained sufficient to support himself; and from that time, till the moment he was taken, he had employed himself in such unremitting labour, that he had not stirred out of his room for eight months together. ‡ *(a)*

Examples, however, of this kind the writer probably thinks so very uncommon, that they ought not at all to shake the opinion, which he seems to entertain, that all who suffer are incorrigible; for this is the only construction which can be put upon his motto, as applied to his system:

——————— *immedicabile vulnus*
Ense recidendum, ne pars sincera trahatur : *

‡ Sess. pap. May, 1785, p. 700. *(a)* Page 55.

* *Ovid. Met. lib. i. v.* 190; and see the title page of the *Appendix* to the *Thoughts*, &c.

the curtailed and mutilated sentence of a licentious poet, which this severe author does not disdain to place in the front of his appendix, as an authority decisive of this important question. He must however forgive me if I restore what he has omitted, and what few persons, I believe, beside himself, will think unimportant.

CUNCTA PRIUS TENTATA; *sed immedicabile vulnus*
Ense recidendum, ne pars sincera trahatur. † (*a*)

Have all things then so unquestionably been tried, as to entitle this writer, without imputation, to suppress the former, and to insist only on the latter part of the sentence. He will perhaps answer, that they have; and because the punishment of working on the Thames "has been attended with an increase of all kinds of villainy," ‡ he will hastily infer, that it is impossible ever to employ convicts in public labors with any good effect. But is it a just or a fair deduction, to conclude, that these men never can be employed with any advantage to the public, upon any scheme that can be imagined, because only public inconvenience has been found to result from the trial of one plan, which was ill imagined, and ill executed? To pronounce that to be impracticable which men have not perseverance or skill to put into practice, suits

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† "It is, it must be owned, much easier to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which, through ignorance or indolence, he will not attempt to cure." 4 Blackst. Com. 17.—The author might have found, in the poet whom he cites, a motto much better suited to the spirit of his work, than that which he has chosen.

Ibimus in pœnas, et qua vocat ira sequemur.

‡ *Thoughts, &c. p.* 75.

(*a*) Page 56.

well enough with modern indolence and presumption; but betrays, in all cases, a deficiency of wisdom, and, in those where the lives and the eternal happiness of individuals are concerned, a total want of humanity. (a)

The fact, however, is, that a plan for the punishment of criminals, has not only been imagined, but has even been adopted by the legislature, which seems to be wholly unobjectionable. * A plan, which unites the advantages of a charitable with those of a penal institution, and has in view that important end of punishment, which has been overlooked in almost all our other laws—the reformation of the criminal: for, at the same time that it promises to subdue the fiercest and most ungovernable spirits by solitary confinement and continued labor, it would be a kind of asylum to that very large description of offenders, who are rendered such by the defects of education, by pernicious connexions, by indigence, or by despair. These it would keep apart from their infectious companions. It would instil into their minds principles of religion and morality, instruct them in useful trades, and furnish them with resources to become valuable members of society, when restored to their liberty. What it is that retards the execution of this excellent plan, it is not easy to conjecture; for, though the expence of erecting the penitentiary houses would be considerable, yet that is surely but a trifling object, compared with the benefit which, as it should seem, must necessarily result to the country from such an institution. And, according to the calculations which have been made upon the subject, when the houses were once erected, the annu-

* See the statute 19 Geo. III. c. 74, which was drawn by Sir William Blackstone and Mr. Eden. Howard's *State of Prisons*, last edit. p. 470. Many of the ideas in this act have been much improved in the admirable plans of Mr. Blackburne.

(a) Page 58.

al expence of maintaining them would be more than defrayed by the earnings of the convicts. (*b*)

But to return to the "*Thoughts on executive justice*": the principle, which the writer of them endeavours to establish, is, that the laws ought to be strictly executed, in order that men may be deterred from committing crimes by the certainty of punishment. And there can be no doubt that, if it were absolutely certain that punishment would attend upon every crime, as its inevitable consequence, none would ever be committed, but those which are instigated by despair, or by the frenzy of some ungovernable passion; because every rational being does, unquestionably, in every action of his life, propose to himself some advantage, immediate or remote; but, if punishment were the certain consequence of crimes, no criminal could persuade himself, that by perpetrating his guilty designs, he would acquire any benefit to himself; but must know on the contrary, that he would draw down a certain evil on his head. To suppose, that a man would violate the law under such circumstances, for the sake, perhaps, of some momentary enjoyment, is to suppose, contrary to nature, that he would knowingly swallow a deadly poison, because it was pleasing to the taste. (*c*)

If such an absolute certainty could be established, it were the most wanton cruelty to punish with death any other crime than murder; for the gentlest penalties would then be sufficient to prevent all those crimes, which are produced by the desire of gain; since none would make such an attempt to gratify that desire, as he must know could end only in loss and disappointment: and a rational being will no more cut his finger than his throat, by design. (*d*)

That an absolute certainty of punishment is, however, quite unattainable, is clear from this consideration alone; that

(*b*) Page 61. (*c*) Page 63. (*d*) Page 64.

punishment is inflicted in consequence of the judgment of men, and that men have only imperfect faculties, and are always liable to err. Neither the jury nor the judge can look into the heart of the prisoner: they must decide according to evidence; that evidence may be defective, and consequently the criminal may always nourish hopes that he shall not be convicted of the crime which he meditates. It is wild therefore to talk about establishing "a certainty of suffering if men offend;" ‖ for the utmost that can be done is to lessen the probability which offenders have of escaping; and when the question is, whether the existing laws shall be rigidly enforced, the matter chiefly to be considered is, whether the mischief resulting from such a measure, would not far outweigh all the good that can be attained by cutting off some of a felon's hopes of impunity. (*e*)

If the power of pardoning were abolished, and conviction doomed the convict to inevitable death, the chances against a criminal would be greater undoubtedly than they are at present, but there would still be a very considerable chance in his favour; and a thief, like a deluded gamester, will play on, even though the odds be against him. He can hardly be supposed to be so accurate a reasoner, or so exact a calculator, as this system presumes. He is hardly accustomed to reflect much on what is past, or to look forward very thoughtfully on what is to come. His crimes and his tumultuous pleasures make up the business of his life, which is hurried on through one continued round of violence, riot, and dissipation: and the gallows, which tears his accomplice from him, inspires him with no other care than to find out some new companion. The state of mind of a criminal, in the moment of violating the law, is thus finely described by an historian, who was a

‖ Thoughts, &c. p. 117, 1st edit. 124, 2d. edit.

(*e*) Page 66.

perfect master of the human heart; *neque periculi nescius erat sed nonnulla fallendi spe, simul magnis præmiis opperiri futura, & præsentibus frui pro solatio habebat.* With such a temper of mind, can it be supposed, that a man will be prevented from committing any crime, because he has only three chances of escaping, where he once had four? and that this is all that can be expected from the measures which are proposed, a little reflection will evince. For the criminal who could not expect a pardon, would still have left other, and very fruitful sources of encouragement, and of deceitful hope. He might still flatter himself, that he should be able to elude all the pursuits of the officers of justice; * that the men, whom he had robbed, might not recollect his person; that compassion might prevent them from swearing positively against him; or that the jury might be touched with pity, and acquit him in spite of the clearest evidence. The object therefore which this writer aims at is not to be

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* The history of the two brothers of the name of Weston, who, after having robbed the mail, baffled all that vigilant zeal in their pursuers, which was quickened by the very large rewards offered, both by the government and by the post office, and established themselves securely in the country as farmers; and the example of the notorious pickpocket, who has been repeatedly tried at the Old Bailey without being convicted, may be supposed to have at least as much influence on the conduct of robbers, as the story either of Patrick Madan, who was so often convicted and so often reprieved (*Thoughts*, &c. p. 92, 1st Edit. 96, 2d edit.) or of that highwayman "who," we are told with the most immoral and most indecent jocularity, "might console himself, like the heroic Portius, with saying,

"'Tis not in mortals to command success,
"We will do more, Sempronius, we'll deserve it."

Thoughts, &c. p. 59, 1st edit. 63, 2d edit.

attained by the means which he recommends; and the consequence of adopting his system would only be, that much blood would be spilt to very little purpose. The truth of this assertion does not rest merely upon argument and probability, experience proves it. The system so earnestly recommended has been tried, tried in this very country, and tried without the least success; for, in the cases of forgery, and robbing the mail, the law has been always executed with the utmost severity, that the most unfeeling rigourist could wish, † ministers being even afraid to pardon such offenders, on account of the clamours of trading people, governed by sordid passions, and by the rage of interest; and yet those crimes were never more frequent in England than they have been during the last twenty years. From this experience we may, I think, fairly conclude, that the measure, if adopted, could not be efficacious; let us, in the next place, see how far it would be just or legal. (*f*)

It is proposed that the laws should be strictly enforced, that all their terrors should be awakened, and their utmost severity called into action, and this, in the true spirit of a tyrant, when the people least expect it, and when they have been long lulled into security by the mild administration of justice; for no other promulgation of this resolution is proposed than its sudden execution. In what respect such a proceeding is less unjust, less illegal, or less inhuman, than an *ex post facto* law, I profess myself unable to discover. Uninterrupted usage constitutes law, nay, according to a maxim very familiar to lawyers, established errors become the law of the land. ‡ That mode which has long and uniformly prevailed, and which has been acquiesced in by those who have the power of controling the executive magistrate, is certainly

† This the author of the Thoughts himself admits. See the note p. 108, 2d edit.

‡ *Communis error facit jus.*

(*f*) Page 71.

the legal and established mode of executing the law. That mode is notwithstanding now to be laid aside, and a very different and even contrary mode to be adopted in its stead, without so much as previous notice being given to the public by a proclamation from the crown. Even they, who, a little before the commencement of the last war, ventured to advise the king to revive an obsolete statute of Henry the eighth, and to try men in England for treasons committed in foreign parts, yet thought it not advisable to go all the lengths this gentleman recommends, but took care to temper the injustice of the measure by having it notified to the world, and notified in the most public and solemn manner, by an address to the crown from both houses of parliament. But in the present case, the subject not being one of those which are considered as of great political importance, nor of sufficient dignity to rouze the zeal of any opposition, it is probably thought that a previous promulgation may safely be omitted, as a vain and superfluous ceremony. And it is certainly true, that the gibbets, which are first loaded with the victims of this bloody resolution, will sufficiently publish it to the world; but then it is not easy to conceive, by what casuistry the executive power will acquit itself of the charge of having wantonly spilt the blood of those wretches, which its former relaxation will have ensnared, and made the prey of its present rigour.(g)

But yet such a proceeding is represented by the writer as a kind of duty to the legislature, whose intentions he takes upon himself to say have been frustrated, * and whose dignity he insinuates has been insulted † by the conduct of the judges: and yet that legislature has never expressed the slightest dis-

* Thoughts, &c. p. 13, 44, 1st. edit. 45, 2nd. edit.

† Ibid. p. 46, 1st. edit. 48, 49, 2nd. edit.

(g) Page 80.

approbation of the mode in which the laws are now executed, although it must necessarily be presumed to be better acquainted with its own sentiments than any officious individual can be. There is the greatest reason to imagine, not only that the legislature does not disapprove, but on the contrary that it highly approves of the spirit in which the laws have long been executed. To suppose the legislature ignorant or indifferent upon such a subject, is to suppose it culpable in the extreme; its silence therefore cannot be considered as negative, but must be construed into a sanction, and a warm approbation. *Dum tacet clamat.* And indeed it is hardly possible to doubt, that the parliament had the clemency of the crown in its contemplation, when it passed all those modern statutes, by which new felonies are created; for that the legislators of an enlightened age, and of a nation boastful of its humanity, should punish the slightest offences with death, is not to be accounted for, but upon the supposition, that those punishments are only held out as a terror, and never intended to be inflicted but in the most aggravated cases. *(h)*

The author of the *Thoughts on Executive Justice*, judging rightly that his system stood in need of some other support than the arguments by which he has attempted to maintain it, endeavours to avail himself of some of the greatest authorities, ancient and modern. The venerable names of Plato and of Cicero are resorted to for this purpose, though neither the philosopher *, nor the orator †, spoke of any other laws than

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* By the laws of Plato, theft was to be punished by a penalty of double the value of the thing stolen, or by imprisonment, if the thief were unable to pay the penalty.—*Plato de leg. dial.* 9.

† The punishment of theft, by the Roman law, was a penalty in some cases of double, and in others of four times the value of the thing stolen.—*Aul. Gell. lib. xi. c.* 18. *Inst. lib. iv. tit.* 1. §. 3, 5.

(*h*) Page 82.

those by which offences against property were punished only with pecuniary amercements. Montesquieu and Beccaria too are cited as approving this unmerciful doctrine, though both those writers contend that the laws should be religiously executed only where they are mild and equitable. ‡ The gentleman undoubtedly forgot, that one of those authors has very strenuously maintained, that it is both unjust and impolitic to inflict the punishment of death for any, even the most atrocious crimes; * and that the other expressly approves of the very practice established here, which this writer so strongly reprobates, that of mitigating the punishment of robbers. † Little did the benevolent Beccaria think, while he was composing his work, of which every sentence was dictated by a spirit of humanity, and for which he desired no greater reward than the blessings and the grateful tears of some victim rescued by him from judicial tyranny and injustice; § little did he think that the time would ever arrive,

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‡ See Montesquieu, *de l'esprit, des loix, liv. vi. c.* 12. *de la puissance des peines;* and *c.* 16. *de la juste proportion des peines avec le crime;* and Beccaria *dei delitti e delle pene*, §. 20. where he says, *la severità di un giudice inesorabile, per essere un' utile virtù, dev' essere accompagnata da una dolce legislazione. Nel disordine del sistema criminale, il perdono e le grazie sono necessarie in proporzione dell' assurdità delle leggi, e dell' atrocità delle condanne;* and see §. 15. *della dolcezza delle pene.*

* *Dei delitti e delle pene*, §. 16. *della pena di morte.*

† *De l'esprit des loix, liv. vi. c.* 16.

§ *Se sostenendo i diritti degli uomini, e della invincibile verità contribuissi a strappar dagli spasimi, e dalle angosce della morte qualche vittima fortunata della tirannia o della ignoranza, ugualmente fatale, le benedizioni e le lagrime di un solo innocente nei trasporti della gioja mi consolerebbero dal disprezzo degli uomini.* Dei delitti e delle pene, introd.

when his name would be cited as an authority to confirm and to invigorate that tyranny and that injustice; when his book would be made the instrument of extending all the evils of those systems of criminal law which he sought to reform; when all his principles which favored humanity, would be rejected, and those alone would be adopted, which, being applied to the existing laws, could serve but to aggravate their severities, and to multiply their mischiefs. *(a)*

Undoubtedly, to render laws respected and efficacious, they must be strictly executed; § but a far more indispensable requisite to that end is, that those laws be wise and just; for otherwise, the more rigorously they are enforced, the more they will be detested and despised. If we would have our laws invariably executed, we must first render them such, that all the wise and honest will join their wishes, and contribute their exertions, to have them observed; and not leave them armed with such severities, that nature tells one it is a virtue to disappoint and to prevent their execution. In a despotic state, it may perhaps be possible to execute the most unnatural laws with the most obdurate rigor; but it will assuredly be impossible under an English government, as long as the nature of man endures, and some faint sparks of humanity remain unextinguished in his bosom. Were the judges to adopt this writer's principles, and to leave every man for execution, who had been convicted upon full evidence, the consequence would inevitably be, that much fewer criminals would be convicted. Juries would then take upon themselves to judge of the policy and justice of the law, upon which every prisoner was indicted; and all those evils which the writer so well describes, in the beginning of the second part of his work, would be infinitely multiplied, for jurors would easily quiet

§ Thoughts, &c. p. 132, 1st. edit. 138, 2d. edit.

(a) Page 87.

their consciences upon a perjury which was the means of preventing murder. Those witnesses who come into courts of justice, thirsting for the large rewards which the legislature or the government holds out to them, might still, it is probable, be officious to discharge their gainful duty; but few other persons would consent to appear in the characters of prosecutors, or of witnesses, where they must be instrumental in, what they would consider as, acts of solemn injustice and cruelty. And thus offenders, instead of suffering, as they now do, a milder punishment than the law prescribes, would be left in most cases to enjoy complete impunity. * *(b)*

Nevertheless, I will readily agree with the writer, "that something should be done, or we may apprehend much worse consequences than we have hitherto experienced." † But that something is not what he has pointed out, and it is the more important that the public should know it is not, because; by a strange infatuation he endeavours to damp all other projects, and fondly insists that his, and his "alone, can deliver us from our present dreadful situation." ‡ As to the most effectual, but

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* This is the effect which the rigid execution of the law has produced among the French, if we may believe one of their own magistrates. Speaking of the law by which a servant who robs his master is punished with death, he says, *Cette loi si dure s'est corrigée par elle même: l'horreur de voir un gibet à sa porte, et la crainte de la haine et des malédictions publiques, arrêtent la plainte des maîtres; et l'excès même du châtiment a produit l'impunité d'un vol, qu'une loi plus modérée eût infailliblement réprimée.* Discours sur l'administration de la justice criminelle, par M. Servan, avocat général a Grenoble. Lyon 1774, p. 96; and see *Observations concernant l'execution de l'article ii. de la declaration sur le vol.*

† Thoughts, &c. p. 123, 1st edit. 128, 2d edit.

‡ Thoughts, &c. p. 87, 88, 1st edit. 92, 2d edit.

(b) Page 90.

what he is pleased to call "the subordinate means of preventing crimes, such as encouraging industry, and diminishing the sources of vice and dissipation," these he dismisses with the contemptuous epithet of "palliatives," and with telling us, "that he fears they will not now avail;" ‡ though, I believe, it is the first time that a remedy, which strikes at the root of the evil, was stiled a palliative, or that a man presuming to think his arguments might influence the public opinion, ventured to declare, that it was more important to punish crimes, than to prevent vices. But however lightly he may pass over this topic, few of his readers, I believe, will think it undeserving a little more attention. His assertion "that it is most of all to be wished, that crimes might be lessened by prevention," § no man can dispute; but at the same time who can go on with him to say, that the most likely means of prevention are, "the fears of severe punishment?" Ought it not rather to be said, that the most likely means are, to preserve uncorrupted that large but unfortunate description of persons, who, being born in misery and indigence, and differing from us in nothing but the accidents of rank and fortune, are entitled to our utmost care and protection? For, if we negligently suffer a thousand sources of profligacy, and encouragements to vice to surround these helpless creatures on every side, what a refinement of cruelty is it, to hang the thieves and profligates whom we have made, and whose only crime was, that they had not such uncommon philosophy and resolution as to be able to resist the temptations with which we have ensnared them? ‖ The writer

‡ Thoughts, p. 78, 79, 1st edit. 82, 2d edit.

§ Ibid. &c. p. 10.

‖ The Chinese consider a man's vices as his misfortunes, and as the effects of the bad education which he has received, and therefore punish his crimes upon the head of his father, whom they

who is much relied on, in the *Thoughts on Executive Justice*, for a purpose, with respect to which he is not so good an authority, as he is for the present; because, I believe, it will be generally allowed, that he possessed the qualities of a magistrate in a much more eminent degree than those of a legislator, was so sensible of the importance of preventing the disorders which are suffered in the lowest ranks of life, that he does not scruple to own, notwithstanding he is so stern an advocate for not pardoning convicts, that considering the little attention which is paid to this particular, "it is a wonder that we have not a thousand more robbers than we have;" and that the circumstance of all the wretches whom he describes as harboured in gin-houses and miserable brothels, not being thieves, "must give us either a very high idea of their honesty or a very mean one of their capacity and courage." * That this evil is rather increased than diminished since that author wrote, will not, I believe, be disputed. Nor will it be questioned that it is as much our interest, as it is our duty, to remove that evil; for till that be done, crimes must become every day more frequent, and that property which we so highly value, every day more insecure. The means of removing it are plain and obvious—to supply the poor with employment; to prevent them from plunging into drunkenness, gaming, and idleness, which are the forerunners of every other vice; and above all to suppress these disorderly houses and seminaries of thieves, which are notorious to all the officers of the police, but which it is the interest of all of them should continue and should thrive. But to effect all this, one of two things is absolutely necessary; either gentlemen of

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deem the real author of them. This principle might with equal reason be extended farther, and the crimes of the poor be punished upon the rich, who are their natural fathers and guardians.

* An enquiry into the cause of the late increase of robbers, &c. by H. Fielding, Esq. p. 143.

character, of property, and of education, must in every part of the kingdom, undertake the very important duties of justices of the peace (for by such alone can those duties be properly discharged) or some different system of police from that which now prevails, must be established. (c)

Another thing essentially requisite (more so indeed than all the rest) to the prevention of crimes is, what I have before mentioned, and what I must be permitted again to insist on, a total revision and reformation of our penal laws. How it has happened that, that work has never yet been executed, is indeed difficult to conceive. It can hardly have arisen from any distrust of their own abilities for such a task, in those whose peculiar duty it is to undertake it; because, although to compose a perfect criminal code, or, in the words of Solon, "the best that the country can bear," is an enterprize requiring such talents as it would be flattery to compliment any of our ministers, or of our leaders of opposition, with possessing; yet to correct many of the grossest absurdities in our laws, to make them much less inconsistent, much less obscure, and much less inhuman, than they are, is a task to which abilities greatly inferior to those we see every day exerted in interested pursuits, would be fully equal. It is impossible therefore to ascribe the long existence of this evil to any other cause than to that fatal indifference for the public good, which has so unhappily so wide an influence, and which those very laws contribute in a great degree to propagate. One may hope, however, that a sense of the inconveniences, which the public at this moment labours under, from frequent frauds and outrages, may at last overcome this lethargy, and awaken men to the true source of these calamities. But whether it do or not, this may safely be pronounced; unless the penal laws be reformed, all those evils

(c) Page 98.

which the public feels, and which the writer of the *Thoughts* recites and exaggerates, must infallibly continue and increase, even though the practice should be unrelentingly persisted in of hanging up ten or twenty criminals every six weeks in the metropolis, and though in the country the judges' circuits should every where be marked with blood, and they should carry, as we are told "the constitution intended they should carry, terror and astonishment into the minds of all*." *(d)*

But to return to the principal ground of this writer's complaints—the mal-administration of justice by an abuse of the power of suspending or remitting punishment. It is a subject indeed, on which he seems to have no fixed or certain principles. From some passages in his work one might almost conclude, that he thought the judges had not by law any power of reprieving convicts; and that, in every instance of their preventing the immediate execution of a condemned prisoner, they violate their duty and subvert the constitution. If this were the fact†, it would afford such an argument for a reform of our laws, as must be irresistible; for laws so sanguinary, that the very men appointed to guard and enforce, would find themselves compelled to counteract and defeat them; that the very sages of the law would be under the constant

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* Thoughts, &c. p. 25.

† The judge's "standing between the judgment and execution, *is taking upon himself* not only *to be wiser than the law*, but a power, which, if wantonly and causelessly exerted, must render the most important and salutary laws contemptible and useless. The judge, in such a case as this, sets himself above the law, and presumes to exercise an authority with which the constitution has not entrusted even the crown itself." *Thoughts*, &c. p. 46, 1st. edit. 48, 2d. edit.

(d) Page 109.

necessity of acting illegally, and the ministers of the public justice of betraying their public trust; could be considered in no other light than as a disgrace to the nation and a reproach to humanity. If this were a true representation of the conduct of the judges, a reform of the laws would be necessary, if it were only as an indemnity to them. Either the laws ought to be reformed, or the judges impeached. But in truth (and the writer of the *Thoughts* seems by other passages to acknowledge it) the judges have a strictly legal power to reprieve all convicts,: and when it is considered, that by exerting that power they do nothing more, than not prevent the crown from pardoning, it cannot be matter of surprise that reprieves are frequent ‡. (*e*)

The judges are subject to no other restraint in the exercise of this power, than that which is common to every man whom the constitution has entrusted with any discretionary power; the duty of exercising it prudently and conscientiously. Even the crown, in the exercise of its prerogative of pardoning, lies

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‡ "Where the rigour of law," says Mr. Justice Forster, "*bordereth upon* injustice, mercy should if possible interpose in the administration. The judges are ministers appointed by the crown for the ends of public justice; and should have written on their hearts the solemn engagement his majesty is under, *to cause law and justice* IN MERCY *to be executed in all his judgments.*" And in another place, "Whenever, in the case of individuals, the general rule shall be found to *border on* the *summum jus*, the benignity of our law hath provided a proper resource in the equity of the crown. I say the equity of the crown; for mercy to individuals, when properly conducted, is founded in natural equity, and in the principles of our constitution. It is nothing more than weighing the merits of each case, all circumstances considered, in the scale of wisdom and sound policy, against the rigour of the law." Forster's *Crown law*, p. 264, 184.

(*e*) Page 131.

under the same restraint. That these discretionary powers have in every particular instance been properly exercised, either by the crown or by the judges, it is not necessary, nor do I profess to maintain. If it has happened, that thieves of any description have been suffered to go quite unpunished, and have been turned loose upon mankind; and much more, if murderers, or even robbers, guilty of acts of cruelty, have been shielded, by the interposition of the prerogative, from the punishment due by law to their crimes, undoubtedly a very gross breach of trust to the public has been disguised under the false name of mercy to the prisoners; for,

Mercy but murders, pardoning those that kill ‖.

But instances of that kind have of late years but very rarely, if ever occurred. Far, however, be it from me to pay the learned judges so fulsome a compliment as, that "there are not twelve honester or worthier men in the kingdom" than themselves*! Much farther be it from me, before the smile of compliment has passed from my cheek, to stab those venerable magistrates to the heart, with the insolent reproach, that "they are little better than accessaries before the fact †;" or with the scandalous insinuation, that "they save felons only because they are condemned ‡." Yet I will not hesitate to assert, that, whenever those judges have reprieved men convicted of felonies, in which no violence or outrage has been offered to any one, in order that all the circumstances of those poor wretches' cases might be laid before the crown, far from deserving censure, they have done nothing but what became them as men, and what as magistrates they were fully authorized to do by the letter and the spirit of the law, and the constitution. *(f)*

‖ Shaksp. *Rom. and Jul.*

* Thoughts, &c. p. 21.

† Thoughts, &c. p. 68, 1st. edit. 72, 2d. edit.

‡ Ibid. p. 51, 1st. edit. 54, 2d. edit.

(f) Page 136.

LETTER FROM DR. BENJAMIN FRANKLIN TO BENJAMIN VAUGHAN, ESQ. ON THE CRIMINAL LAWS, AND THE PRACTICE OF PRIVATEERING.

My Dear Friend, *March* 14, 1785.

Among the pamphlets you lately sent me, was one entitled, "*Thoughts on Executive Justice.*" In return for that, I send you a French one on the same subject, entitled, "*Observations concernant l'Execution de l'Article 2. de la declaration sur le vol.*" They are both addressed to the judges, but written, as you will see, in a very different spirit. The English author is for hanging all thieves; the Frenchman is for proportioning punishments to offences.

If we really believe, as we profess to believe, that the law of Moses is the law of God, and the dictates of divine wisdom infinitely superior to human; on what principles do we ordain death as the punishment of an offence, which, according to that law, was only to be punished by a restitution of fourfold? To put a man to death for a crime which does not deserve death, is it not murder? And as the French writer says, "*Doit-on punir un dèlit contre la societé par un crime contre la nature?*"

Superfluous property is the creature of society. Simple and mild laws were sufficient to guard the property which was merely necessary. The savage's bow, his hatchet, and his coat of skins, were sufficiently secured, without law, by

the fear of personal resentment and retaliation. When by virtue of the first laws, part of the society accumulated wealth and grew powerful, they enacted others more severe, and would protect their property at the expence of humanity. This was abusing their power, and commencing a tyranny. If a savage before he entered into society, had been told, "Your neighbour by this means may become owner of an hundred deer; but if your brother, or your son, or yourself, having no deer of your own, and being hungry, should kill one, an infamous death should be the consequence;" he would probably have preferred his liberty and his common right of killing any deer, to all the advantages of society that might be proposed to him.

That it is better an hundred guilty persons escape, than that one innocent person should suffer, is a maxim that has been long and generally approved, and never, that I know of, controverted. Even the sanguinary author of the "Thoughts, &c." agrees to it, observing, "that the very thought of injured innocence, and much more that of suffering innocence, must awaken all our tenderest and most compassionate feelings, and, at the same time, raise our highest indignation against the instruments of it. But," he adds, "there is no danger of either from a strict adherence to the laws." Really? Is it then impossible to make an unjust law? And if the law itself be unjust, may it not be the very "instrument" which ought "to raise the author's and every body's highest indignation." I see, in the last news-papers from London that a woman is capitally convicted at the Old Bailey, for privately stealing out of a shop some gauze, value fourteen shillings and three-pence, and the punishment of an human creature for this offence is by death on a gibbet! Might not that woman, by her own labour and industry, have made the reparation ordained by God in paying fourfold? Is not all punishment inflicted beyond the merit of the offence, so much

punishment of innocence? In this light how vast is the annual quantity, of not only injured but suffering innocence, in almost all the civilized states of Europe!

But it seems to have been thought that this kind of innocence may be punished by way of preventing crimes. I have read indeed of a cruel Turk in Barbary, who, whenever he bought a new christian slave, ordered him immediately to be hung up by the heels, and to receive an hundred blows of a cudgel on the soles of his feet, that the severe sense of the punishment, and fear of incurring it thereafter, might prevent the faults that should merit it. Our author himself would hardly approve entirely of this Turk's conduct in the government of slaves, and yet he appears to recommend something like it for the government of English subjects.

He applauds the reply of judge Burnet to the convicted horse-stealer, who being asked what he had to say, why judgment of death should not be passed against him? and answering, that it was hard to hang a man for only stealing a horse, was told by the judge, "man, thou art not to be hanged only for stealing a horse, but that horses may not be stolen."

But the man's answer, if candidly examined, will, I imagine, appear reasonable, as being founded upon the eternal principles of justice and equity, that punishments should be proportioned to offences, and the judge's reply brutal and unreasonable, though the writer "wishes all judges to carry it with them whenever they go the circuits, and to bear it in their minds, as containing a wise reason for all the penal statutes which they are called upon to put in execution."

"It at once illustrates (says he) the true grounds and reasons of all capital punishments whatsoever, namely, that every man's property, as well as his life, may be held sacred and inviolate."

Is there then no difference in value between property an life? If I think it right that the crime of murder be punishe with death, not only as an equal punishment of the crime but to prevent other murders, does it follow that I must approve of inflicting the same punishment for a little invasion o my property by theft? if I am not myself so barbarous, sc bloody-minded, and revengeful, as to kill a fellow creature fo stealing from me fourteen shillings, and three pence, how can I approve of a law that does it?

Montesquieu, who was himself a judge, endeavours to impress other maxims. He must have known how humane judges feel on such occasions, and what the effects of thos feelings are; and so far from thinking that severe and excessive punishments prevent crimes, he asserts, as quoted by ou French writer, that

"*L'atrocité des loix en empêche l'exécution.*"

"*Lorsque la peine est sans mesure on est souvent oblig de lui préférer l'impunité.*"

"*La cause de tous les relâchemens vient de l'impunité d crimes, et non de la moderation des peines.*"

It is said, by those who know Europe generally, that the are more thefts committed and punished annually in Engla than in all other nations put together. If this be so, the must be a cause or causes for such great depravity in t common people.

I am, &c.

BENJAMIN FRANKLIN.

DR. GOLDSMITH.

Published in the Year 1760.

I next attended the Sheriff's officers to the prison, which had been formerly built for the purposes of war, and consisted of one large apartment, strongly grated, and paved with stone, common to both felons and debtors at certain hours in the four and twenty. Besides this, every prisoner had a separate cell, where he was locked in for the night.

I expected, upon my entrance, to find nothing but lamentations, and various sounds of misery; but it was very different. The prisoners seemed all employed in one common design, that of forgetting thought in merriment or clamour. I was apprised of the usual perquisite required upon these occasions, and immediately complied with the demand, though the little money I had was very near being all exhausted. This was immediately sent away for liquor, and the whole prison was soon filled with riot, laughter, and profaneness.

"How!" cried I to myself, "shall men so very wicked be cheerful, and shall I be melancholy? I feel only the same confinement with them, and I think I have more reason to be happy."

With such reflections I laboured to become cheerful; but cheerfulness was never yet produced by effort, which is itself painful. As I was sitting, therefore, in a corner of the gaol, in a pensive posture, one of my fellow prisoners came up, and sitting by me, entered into conversation. It was my constant rule in life never to avoid the conversation of any man who

seemed to desire it: for if good, I might profit by his instructions; if bad, he might be assisted by mine. I found this to be a knowing man, of strong unlettered sense, but a thorough knowledge of the world, as it is called; or, more properly speaking, of human nature on the wrong side. He asked me if I had taken care to provide myself with a bed, which was a circumstance I had never once attended to.

"That's unfortunate," cried he, "as you are allowed nothing but straw, and your apartment is very large and cold. However, you seem to be something of a gentleman, and as I have been one myself in my time, part of my bed-clothes are heartily at your service." I thanked him, professing my surprize at finding such humanity in a gaol, in misfortunes.

We were now prevented from further conversation by the arrival of the gaoler's servants, who came to call over the prisoner's names and lock up for the night. A fellow also, with a bundle of straw for my bed, attended, who led me along a dark narrow passage into a room paved like the common prison, and in one corner of this I spread my bed, and the clothes given me by my fellow prisoner; which done, my conductor, who was civil enough, bade me a good night. After my usual meditations, and having praised my Heavenly Corrector, I laid myself down and slept with the utmost tranquillity till morning.

The next morning early, I was awakened by my family, whom I found in tears at my bed side. The gloomy appearance of every thing about us, it seems, had daunted them. I gently rebuked their sorrow, assuring them I had never slept with greater tranquillity.

I walked down to the common prison, where I could enjoy more air and room. But I was not long there, when the exe-

erations, lewdness, and brutality, that invaded me on every side, drove me back to my apartment again. Here I sat for some time pondering upon the strange infatuation of wretches, who, finding all mankind in open arms against them, were labouring to make themselves a future and a tremendous enemy.

Their insensibility excited my highest compassion, and blotted my own uneasiness from my mind. It even appeared a duty incumbent upon me to attempt to reclaim them. I resolved, therefore, once more to return; and in spite of their contempt, to give them my advice, and conquer them by perseverence. Going, therefore, among them again, I informed Mr. Jenkinson of my design; at which he laughed heartily, but communicated it to the rest. The proposal was received with the greatest good humour, as it promised to afford a new fund of entertainment to persons who had now no other resource for mirth, but what could be derived from ridicule or debauchery.

I therefore read them a portion of the service, with a loud unaffected voice, and found my audience perfectly merry upon the occasion. Lewd whispers, groans of contrition burlesqued, winking and coughing, alternately excited laughter. However, I continued with my natural solemnity to read on, sensible that what I did might amend some, but could itself receive no contamination from any.

After reading, I entered upon my exhortation, which was rather calculated at first to amuse them than to reprove. I previously observed, that no other motive but their welfare could induce me to this; that I was their fellow-prisoner, and now got nothing by preaching. I was sorry, I said, to hear them so very profane, because they got nothing by it, and might lose a great deal.

When I had concluded, I received the compliments of my audience; some of whom came and shook me by the hand, swearing that I was a very honest fellow, and that they desired my further acquaintance. I therefore promised to repeat my lecture next day, and actually conceived some hopes of making a reformation here; for it had ever been my opinion, that no man was past the hour of amendment, every heart lying open to the shafts of reproof, if the archer could but take a proper aim.

The next morning I communicated to my wife and children the scheme I had planned of reforming the prisoners, which they received with universal disapprobation, alleging, the impossibility and impropriety of it; adding, that my endeavour would no way contribute to their amendment; but might probably disgrace my calling.

"Excuse me," returned I; "these people, however fallen, are still men, and that is a very good title to my affections. Good counsel rejected returns to enrich the giver's bosom; and though the instruction I communicate may not mend them, yet it will assuredly mend myself. If these wretches, my children, were princes, there would be thousands ready to offer their ministry; but, in my opinion, the heart that is buried in a dungeon is as precious as that seated upon a throne. Yes, my treasures, if I can mend them, I will: perhaps they will not all despise me. Perhaps I may catch up even one from the gulph, and that will be great gain; for is there upon earth a gem so precious as the human soul?"

Thus saying, I left them, and descended to the common prison, where I found the prisoners very merry, expecting my arrival; and each prepared with some gaol trick to play upon the Doctor. However, I took no notice of all that this mischievous groupe of little beings could do; but went

en, perfectly sensible, that what was ridiculous in my attempt would excite mirth only the first or second time, while what was serious would be permanent. My design succeeded; and in less than six days, some were penitent, and all attentive.

It was now that I applauded my perseverence and address, at thus giving sensibility to wretches divested of every moral feeling, and now began to think of doing them temporal services also, by rendering their situation somewhat more comfortable. Their time had hitherto been divided between famine and excess, tumultuous riot, and bitter repining. Their only employment was quarrelling among each other, playing at cribbage, and cutting tobacco-stoppers. From this last mode of idle industry I took the hint of setting such as chose to work, at cutting pegs for tobacconists and shoemakers, the proper wood being bought by a general subscription, and when manufactured, sold by my appointment: so that each earned something every day: a trifle indeed, but sufficient to maintain him.

I did not stop here, but instituted fines for the punishment of immorality, and rewards for peculiar industry. Thus, in less than a fortnight, I had formed them into something social and humane, and had the pleasure of regarding myself as a legislator, who had brought men from their native ferocity into friendship and obedience.

And it were highly to be wished that legislative power would thus direct the law, rather to reformation than severity; that it would seem convinced that the work of eradicating crimes is not by making punishments familiar, but formidable. Then, instead of our present prisons, which find, or make men guilty; which enclose wretches for the commission of one crime, and return them, if returned alive, fitted for the perpetration of thousands; it were to be wished we had,

as in other parts of Europe, places of penitence and solitude, where the accused might be attended by such as could give them repentance, if guilty, or new motives of virtue, if innocent. And this, but not the encreasing punishments, is the way to mend a state: nor can I avoid even questioning the validity of that right which social combinations have assumed, of capitally punishing offences of a slight nature. In cases of murder their right is obvious, as it is the duty of us all, from the law of self-defence, to cut off that man who has shewn a disregard for the life of another: against such, all nature rises in arms: but it is not so against him who steals my property. Natural law gives me no right to take away his life, as by that, the horse he steals is as much his property as mine. If then I have any right, it must be from a compact made between us, that he who deprives the other of his horse shall die. But this is a false compact; because no man has a right to barter his life, no more than take it away, as it is not his own. And, besides, the compact is inadequate, and would be set aside even in a court of modern equity, as there is a great penalty for a trifling convenience; since it is far better that two men should live, than one man should ride. But a compact that is false between two men, is equally so between a hundred, and a hundred thousand; for as ten millions of circles can never make a square, so the united voice of myriads cannot lend the smallest foundation to falsehood. It is thus that reason speaks, and untutored nature says the same thing. Savages, that are directed by natural law alone, are very tender of the lives of each other; they seldom shed blood but to retaliate former cruelty.

Our Saxon ancestors, fierce as they were in war, had but few executions in times of peace; and in all commencing governments that have the print of nature still strong upon them, scarce any crime is held capital.

It is among the citizens of a refined community, that penal

laws, which are in the hands of the rich, are laid upon the poor. Government, while it grows older, seems to acquire the moroseness of age: and, as if our property were become dearer in proportion as it encreased; as if the more enormous our wealth, the more extensive our fears; all our possessions are paled up with new edicts every day, and hung round with gibbets to scare every invader.

I cannot tell whether it is from the number of our penal laws, or the licentiousness of our people, that this country should show more convicts in a year than half the dominions of Europe united. Perhaps it is owing to both; for they mutually produce each other. When by indiscriminate penal laws, a nation beholds the same punishment affixed to dissimilar degrees of guilt, from perceiving no distinction in the penalty, the people are led to lose all sense of distinction in the crime, and this distinction is the bulwark of all morality: thus the multitude of laws produce new vices, and new vices call for fresh restraints.

It were to be wished then, that power, instead of contriving new laws to punish vice; instead of drawing hard the cords of society till a convulsion come to burst them; instead of cutting away wretches as useless, before we have tried their utility; instead of converting correction into vengeance; it were to be wished that we tried the restrictive arts of government, and made law the protector, but not the tyrant of the people. We should then find, that creatures whose souls are held as dross, only wanted the hand of a refiner; we should then find the wretches, now stuck up for long tortures, lest luxury should feel a momentary pang, might, if properly treated, serve to sinew the state in times of danger; that as their faces are like ours, their hearts are so too; that few minds are so base, as that perseverance cannot amend; that a man may see his last crime without dying for it; and that very little blood will serve to cement our security.

Published about the Year 1750.

Ask an Englishman, What nation in the world enjoys most freedom? and he immediately answers, his own. Ask him in what that freedom principally consists, and he is instantly silent. This happy pre-eminence does not arise from the people's enjoying a larger share in legislation than elsewhere; for, in this particular, several states in Europe excel them; nor does it arise from a greater exemption from taxes, for few countries pay more; it does not proceed from their being restrained by fewer laws, for no people are burdened with so many; nor does it particularly consist in the security of their property, for property is pretty well secured in every polite state of Europe.

How then are the English more free (for more free they certainly are) than the people of any other country, or under any other form of government whatever? Their freedom consists in their enjoying all the advantages of democracy, with this superior prerogative, borrowed from monarchy, that "the severity of their laws may be relaxed without endangering the constitution."

In a monarchical state, in which the constitution is strongest, the laws may be relaxed without danger; for though the

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* The Citizen of the World, Chap. 50.

people should be unanimous in the breach of any one in particular, yet still there is an *effective* power superior to the people, capable of enforcing obedience, whenever it may be proper to inculcate the law, either towards the support or welfare of the community.

But in all those governments where laws derive their sanction from the people alone, transgressions cannot be overlooked without bringing the constitution into danger. They who transgress the law, in such a case, are those who prescribe it; by which means it loses not only its influence, but its sanction. In every republic the laws must be strong, because the constitution is feeble; they must resemble an Asiatic husband, who is justly jealous because he knows himself impotent. Thus, in Holland, Switzerland, and Genoa, new laws are not frequently enacted, but the old ones are observed with unremitting severity. In such republics, therefore, the people are slaves to laws of their own making, little less than mixed monarchies, where they are slaves to the will of one, subject to frailties like themselves.

In England, from a variety of happy accidents, their constitution is just strong enough, or, if you will, monarchical enough, to permit a relaxation of the severity of laws, and yet those laws still to remain sufficiently strong to govern the people. This is the most perfect state of civil liberty of which we can form an idea; here we see a greater number of laws than in any other country, while the people, at the same time, obey only such as are immediately conducive to the interests of society. Several are unnoticed, many unknown; some kept to be revived and enforced upon proper occasions; others left to grow obsolete, even without the necessity of abrogation.

Scarcely an Englishman who does not, almost every day of his life, offend with impunity against some express law, and

for which, in a certain conjuncture of circumstances, he would not receive punishment. Gaming-houses, preaching at prohibited places, assembled crouds, nocturnal amusements, public shows, and an hundred other instances, are forbid and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal or mercenary attempt to enforce them.

The law, in this case, like an indulgent parent, still keeps the rod, though the child is seldom corrected. Were those pardoned offences to rise into enormity, were they likely to obstruct the happiness of society, or endanger the state, it is then that justice would resume her terrors, and punish those faults she had so often overlooked with indulgence. It is to this ductility of the laws that an Englishman owes the freedom he enjoys, superior to others in a more popular government: every step, therefore, the constitution takes towards a democratic form, every diminution of the legal authority, is, in fact, a diminution of the subject's freedom: but every attempt to render the government more popular, not only impairs natural liberty, but even will at last dissolve the political constitution.

TABLEAU DE PARIS.

SENTENCE OF DEATH.

WHAT boding voice is that, which with its harsh clamors fills the streets and the suburbs, forces its way to the very tops of the houses, and announces that a human being, in the full vigor of youth, is going to be massacred in cold blood, by another human being, in the name of society? It is that of one hurrying along, and in discordant tones crying for sale the sentence still wet from the press. Purchasers gather round him, anxious to learn the name and crime of the delinquent, both of which, however, are quickly forgotten. A sudden and unexpected conviction has appalled the public mind. The populace hasten from their trades and their shops, and throng to the scaffold, to observe how the sufferer will go through the great scene of dying in public, in the midst of torments.

The philosopher in his quiet retreat, shudders, as he hears the sentence cried, and sitting down again to his desk, with a heaving heart, and melting eye, discusses the subject of penal laws, and the necessity of capital punishments—inquiring at the same time, whether government or laws are themselves totally free, under this head, from all grounds of self-reproach, and while he, in his solitary apartment, is thus pleading the cause of humanity, and anticipating in imagination the prize of Berne, the executioner is wielding his iron bar, crushes his wretched victim, with eleven successive blows, doubles him upon a wheel, not (as ordained in the sentence;)

with his face turned toward heaven, but horribly hanging downward: his shattered bones pierce through the flesh: his hair, stiffened by anguish, drops bloody sweat: throughout his protracted agony, the poor sufferer alternately begs for water, and death. The crowd, with their eyes fixed on the dial-plate of the Hotel-de-Ville, count the strokes of the clock, shudder in dismay at the dreadful spectacle, and are silent.

But the next morning, the scàffold is again erected for a fresh offender. The horrid exhibition of the preceding evening has failed to prevent a repetition of offence. The throng re-assemble to a renewal of the scene of blood; the executioner washes his crimsoned hands, and mingles with the mass of his fellow-citizens*.

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* *SENTENCE DE MORT.*

Quelle voix sinistre et rétentissante èmplissant les rues et les carrefours, se fait entendre jusqu' au sommet des maisons et crie qu'un homme plein de jeunesse va perir, egorgè de sang froid par un autre homme, au nom de la société? le colporteur en courant et hurlant; vend la sentence encore humide, on l'achete pour savoir le nom du coupable et apprendre quel est son crime: on a bientôt oublié l'un et l'autre, c'est une condamnation subite qui vièn epouvanter les esprits au moment où l'on ne s'y attendoit pas. La populace quitte les atteliers et les boutiques et s'attroupe autour de l'échafaud pour examiner de quelle maniere le patient accomplira le grand acte de mourir en public au milieu des tourmens.

Le philosophe, qui du fond de son asyle entend crier la sentence, gemit; et se remettant a son bureau, le cœur gonflé, l'œil attendri, il ecrit sur les loix pénales, et sur ce qui necessite le supplice; il examine si le gouvernement, la loi, n'ont rien a se reprocher; et tandis qu'il plaide la cause de l'humànité dans un cabinet solitaire, et qu'il songe a remporter le prix de Berne, le bourreau frappe avec

A COMMENTARY ON THE MARQUIS DE BECCARIA'S WORK ON CRIMES AND PUNISHMENTS, ATTRIBUTED TO VOLTAIRE.

Published about the Year 1770.

On the Punishment of Death*.

It hath long since been observed, that a man after he is hanged is good for nothing, and that punishments invented for the good of society, ought to be useful to society. It is evident, that a score of stout robbers, condemned for life to some public work, would serve the state in their punishment, and that hanging them is a benefit to nobody but the executioner. Thieves, in England, are seldom punished with

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une large barre de fer ecrase le malheureux sous onze coups, le replie sur une roue, non la face vers le ciel, comme le dit l'arret mais horriblement pendante; les os brués traversent la chair, les cheveux horissés par la douleur distillent une sueur sanglante, le patient, dans ce long supplice, demande tour a tour de l'eau et la mort. Le peuple regarde au cadran de l'Hotel de Ville, et compte les heures qui sonnent, il fremit consterne, contemple, et se tait.

Mais le lendemain un autre criminel fait relever l'echafaud, et le spectacle affreux de la veille n'a point empeché un nouveau forfait la populace revient contempler le meme spectacle; le bourreau lave ses mains sanglantes et va se confondre dans la foule hes citoyens.

* Chap. x.

death, but are transported to the colonies. This is also practised in Russia, where not one criminal was executed during the whole reign of the autocratical Elizabeth. Catherine II. who hath succeeded her, with much more genius, follows her example: yet crimes are not multiplied by this humanity; and it generally happens that the criminals sent to Siberia, in time become honest people. The same is observed in the English colonies. We are astonished at the change, and yet nothing can be more natural. The condemned are forced to continual labour for a livelihood. The opportunities of vice are wanting. They marry and multiply. Oblige men to work, and you certainly make them honest. It is well known, that atrocious crimes are not committed in the country, unless when there is too much holiday, and consequently too much idleness, and consequently too much debauchery.

The Romans never condemned a citizen to death, unless for crimes which concerned the safety of the state. These our masters, our first legislators, were careful of the blood of their fellow citizens; but we are extravagant with the blood of ours.

The question hath been frequently debated, whether a judge ought to have the power to punish with death, when the punishment is undetermined by the law? This question was solemnly agitated in the presence of the emperor Henry VII. who decreed* that no judge should have such a power.

There are some criminal cases which are either so new, so complicated, and so unaccountable, as to have escaped the provision of the laws, and which therefore, in some countries, are left to the discretion of the judge. But for one case in

* Bodin de Republica, lib. 3. c. 5.

which the laws permit the death of a criminal whom they have not condemned, there are a thousand, wherein humanity should save whom the laws have condemned to suffer.

The sword of justice is in our hands, but we ought rather to blunt than to sharpen its edge. It remains within its sheath in the presence of kings, to inform us that it ought seldom to be drawn.

There have been some judges who were passionately fond of spilling human blood; such was Jefferies in England, and such in France was the man whom they called *Coupe-tête*. Nature never intended such men for magistrates, but for executioners.

On Domestic Theft.*

In countries where a trifling domestic theft, or breach of trust, is punished with death, is not the disproportioned punishment dangerous to society? Is it not even an encouragement to larceny? If in this case a master prosecutes his servant, and the unhappy wretch suffer death, the whole neighbourhood holds the master in abhorrence: they perceive that the law is contrary to nature, and consequently that it is a bad law.

What is the result? Masters, to avoid *opprobrium*, content themselves with discharging the thief, who afterwards steals from another, and gradually becomes familiar with dishonesty. The punishment being the same for a small theft as

* Chap. 18.

for a greater, he will naturally steal as much as he can, and last will not scruple to turn assassin to prevent detection.

If, on the contrary, the punishment be proportioned to t crime; if those who are guilty of a breach of trust be co demned to labour for the public, the master will not hesita to bring the offender to justice, and the crime will be less fr quent; so true it is, that rigorous laws are often productive crimes.

PRINCIPLES OF PENAL LAW.

Published about the Year 1775.

The prevention of crimes should be the great object of the lawgiver; whose duty it is, to have a severe eye upon the offence, but a merciful inclination towards the offender. It is from an abuse of language, that we apply the word "Punishment" to human institutions: vengeance belongeth not to man. Criminals, said Plato *, are punished, not because they have offended; for what is done can never be undone: but that for the future the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice. "† Meti Suffeti, inquit Tullus, si ipse discere posses foedera ac fidem servare, vivo tibi ea disciplina a me adhibita esset: nunc, *quoniam tuum insanabile ingenium est, Tu tuo supplicio doce humanum genus ea sancta credere, quæ a te violata sunt.*" It is the end then of penal laws to deter, not to punish.

When the rights of human nature are not respected, those of the citizen are gradually disregarded. Those æras are in history found fatal to liberty, in which cruel punishments predominate. Lenity should be the guardian of moderate governments: severe penalties, the instruments of despotism,

* De Legibus, p. 977.
† Liv. Hist. l. i. c. 28.

may give a sudden check to temporary evils; but they have a tendency to extend themselves to every class of crimes, and their frequency hardens the sentiment of the people. *Une loi rigoureuse produit des crimes.* The excess of the penalty flatters the imagination with the hope of impunity, and thus becomes an advocate with the offender for the perpetrating of the offence.

The convicts, who have stolen * cloth from the tenters, fustian † from the bleaching ground, or a lamb from their landlord's pasture, knew the law to have assigned death, without the benefit of clergy, to each of their offences: but, in the depth of ignorance and profligacy, mere instinct informed them, that common humanity would recoil at the idea, and they relied for their security on the ingenuity of mercy to evade the law.

Legislators should then remember, that the acerbity of justice deadens its execution; and that the increase of human corruptions proceeds, not from the moderation of punishments, but from the impunity of criminals.

In the promulgation of every new offence, let the lawgiver expose himself to feel what wretches feel; and let him not seem to bear hardest on those crimes, which, in his elevated station, he is least likely to commit. "‡ Si les supplices en usage dans presque tout l'orient font horreur a l'humanite, c'est que le Despote, qui les ordonne, se sent au dessus des loix. Il n'en est pas ainsi dans les republiques; les loix sont toujours douces, parce que celui qui les etablit, s'y soumet." If this reasoning be founded in truth, it furnishes a

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* 22 Car. II. c. 25. § 3.

† 4. Geo. c. 16. and 18 Geo. II. c. 19.

‡ De l'Esprit, t. ii. p. 68.

mortifying inference, that men are naturally cruel, when they can be so with safety.

Penal laws are to check the arm of wickedness; but not to wage war with the natural sentiments of the heart.

Obsolete and useless statutes should be repealed; for they debilitate the authority of such as still exist and are necessary. Neglect on this point is well compared by Lord Bacon to the cruelty of Mezentius, who left the living to perish in the arms of the dead.

Persons carrying subjects out of the northern counties*, or giving black mail for protection, jailers forcing prisoners to become approvers †, masons confederating to prevent the statutes of labourers ‡, purveyors in certain cases § though purveyance is abolished, are all capital offenders: and none shall bring pollardz and crockardz (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods ‖. The alterations in our government have rendered these particular provisions totally ineffective; but there are other obsolete statutes, which exist, the possible instruments of mischief in the hand of tyranny.

Civil and criminal laws must accumulate, and become complicated, in proportion to the increased riches of the state, and to the security given to the liberties, lives, honours, and properties of the people. Despotic states admit a simplicity of legislation, the forms and principles of which, depend on the caprices of a weak and ignorant monarch, whose breast is the repository of precedents; but it should be the primary ob-

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* 43 Eliz. c. 13. † 14 Ed. iii c. 10.

‡ 3 Hen. vi c. 1. § 28 Ed. i. stat. 3. c. 1.

‖ 27 Ed. i. ex Rot. in Turr.

ject of free governments, to have the outlines of their privileges, fixed and determinate. When the laws for this purpose are explicit, it is the duty of the judge strictly to conform to them; when they are otherwise, it is the immediate duty of the legislator to ascertain them.

It is not therefore sufficient, that the decision of the fact be guarded from the influence of fear and affection: the adjudication of the law should be a certain consequence of that decision. But, when the penalty prescribed bears an evident and excessive disproportion to the offence, the humanity of the judges will be interested in the evasion of it, "*et magis valebunt acumina ingeniorum, quam auctoritas legis**." And this is a consideration, which, exclusive of every motive of humanity, should induce the lawgiver carefully to discuss the different modes of punishment, as applicable to the different degrees of moral and political guilt.

It is impossible to read the histories of executive justice in different governments, without shuddering at the very idea of those miseries, which men, with unrelenting ingenuity, have devised for each other. In some countries it hath been usual to sew up criminals in the warm skins of beasts, and in this condition to expose them to wild dogs; in others, their limbs are torn asunder by horses; in others, recourse is had to crucifixions, burnings, boilings, flayings, famishings, impalements, and other modes of destruction, equally shocking to decency and humanity.

"Merciful heaven!
Thou rather with thy sharp and sulphurous bolt
Split'st the unwedgeable and gnarled oak,

* Bac. de Augm. Scient.

Than the soft myrtle: O but man, proud man,
Drest in a little brief authority,
(Most ignorant of what he's most assur'd,
His glassy essence) like an angry ape,
Plays such fantastic tricks before high heaven
As make the angels weep.

SHAKESPEARE*.

This imputation of tyranny and cruelty hath at different periods been applicable to every government, of which we have any authentic history. Livy, in respect to his countrymen, hath endeavoured to establish a different inference in his account of the punishment of Metius Suffetius; *Exinde*, "*duabus admotis quadrigis, in currus earum distentus illigatur Metius; deinde in diversum iter equi concitati, lacerum in utroque curru corpus, quâ inhæserant vinculis membra, portantes. Avertêre omnes a tantâ fœditate spectaculi oculos. Primum, ultimumque illud supplicium apud Romanos exempli parum memoris legum humanarum fuit; in aliis gloriari licet, nulli gentium mitiores placuisse pœnas* †." We know that national benevolence ought to be the concomitant of national liberty, and are therefore inclinable to give credit to this assertion; but it will not be found in any degree reconcileable to the united testimony of many other historians. The modes of capital punishment, used by the Romans, were at least as numerous, and as exceptionable, as those of other nations. The head of the malefactor was in some cases fastened within the furca, and in this attitude he was whipped to death ‡; and this was distinguished by the name

* Meas. for Meas. † L. i. c. 28.

‡ *C. C. Caligula curatorem munerum ac venationum per continuos dies in conspectu suo catomis verberatum, non prius occidit, quam offensus putrefacti cerebri odore.*

Sueton. in vitâ Calig. c. 27.

of * *supplicium more majorum*. In other cases, as in the execution of Antigonus, the whipping terminated in beheading †. Crucifixion, or the *servile supplicium*, was in use during many centuries, and first abrogated by Constantine; the sentence also inflicted whipping, "*verbera intra aut extra pomœrium, arbore infelici suspendito* ‡." The criminal was naked in the execution of these different punishments. Parricides § were sewed up in a leathern sack, with an ape, a cock, a serpent, and a dog, and so cast into the sea. It was also usual to cover some offenders with a mantle daubed over with pitch, and then to set fire to it; *Cogita*, inquit Seneca ‖, *illam tunicam alimentis igneis illitam et intextam*. The Emperors introduced a punishment called "*Serræ-dissectio* ¶." *Damnatio in gladium*, or sentence to the public combats, and *damnatio ad bestias* **, were also frequent; and the latter appears to have been very fatal to offenders; "*præclara ædilitas!* said Cicero, *unus Leo, ducenti Bestiarii.*"

These cruelties were founded on the twelve tables of the Decemvirs, and were contrary to the republican spirit. Accordingly by the Porcian law, made in the 454th year of

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* *Codicillos præripuit Nero, legitque se hostem a senatu judicatum, et quæri ut puniatur more majorum: interrogavitque quale esset id genus poenæ. Et cum comperisset, nudi hominis cervicem inseri furcæ, corpus virgis ad necem cædi; conterritus ferrum jugulo adegit.*—Sueton. in vitâ Neron. c. 49.

† Dion. l. xlix. ‡ Liv. l. i. & Val. Max. l. i. c. 7.

§ *Cujus supplicio non debuit una parari*
Simia, nec serpens unus, nec culeus unus. Juv. l. viii.
See also, Dig. 48. ad Leg. Pomp. & Cic. Orat. pro Sext. Roscio.

‖ Ep. 14. ¶ Sueton. in vitâ Calig. c. 27.

** Dig. 48. 19. 11. 3.

Rome, by Porcius Lecca the tribune, it was ordained, that no citizen should be put to death. This exemption was in the extreme of lenity, and erroneous in its foundation. Capital executions are in all states necessary.

Nothing, however, but the evident result of absolute necessity, can authorize the destruction of mankind by the hand of man.

The infliction of death is not therefore to be considered, in any instance, as a mode of punishment, but *merely* as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety.

We may pronounce it then contrary both to sentiment and morality, to aggravate capital executions by any circumstances of terror or pain beyond the sufferings inseparable from a violent death.

I transcribe the following passage from the English state trials. "Hugh Peters, being carried on a sledge to the scaffold, was made to sit thereon within the rails, to behold the execution of Mr. Cook. When Mr. Cook was cut down, and brought to be quartered, Col. Turner ordered the sheriff's men to bring Mr. Peters near, *that he might see it;* and bye and bye the hangman came to him all besmeared in blood, and, rubbing his bloody hands together, he tauntingly asked, "Come how do you like this work, Mr. Peters? how do you like it?" He replied, "friend, you do not well to trample on a dying man*."

* This is not the only instance of ungenerous insults towards the republican sufferers at the restoration. "The regicides (says Bishop Burnet) had at that time been odious beyond expression, yet *the odiousness of the crime began to be much flattened by the frequent executions.* And therefore when Sir Henry Vane was

Lawgivers should remember, that they are, mediately, and in effect, the executioners of every fellow-citizen, who suffers death in consequence of any penal statute; and there are certain contrasted points of view, in which it may be of use to them to consider criminals at the approach of death.

"* *Master Barnardine, what hoa! your friend the hangman! you must be so good sir, to rise, and be put to death: pray, Master Barnardine, awake, till you are executed, and sleep afterwards.*"

The wretch, to whom this last summons is so ludicrously addressed, is represented to us, "as a man, that apprehends death no more dreadfully, but as a drunken dream; careless, reckless, and fearless of what's past, present, or to come."

The crimes of such a man may perhaps have made him unfit to live; but he is certainly unfit to die. The safety of the community, and the preservation of individuals, may call for his execution; but the bosom of humanity will heave in agony at the idea; the eye of religion will turn with horror from the spectacle.

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brought to the scaffold, lest his words should leave impressions on the hearers to the disadvantage of the government, drummers were placed under the scaffold, who, as soon as he began to address the people, upon a sign given, struck up with their drums. After being thus repeatedly interrupted, and even when he was taking leave of his friends, "he gave over, and died with so much composedness, that it was generally thought, that the government had lost more than it had gained by his death." Vol. i. p. 164.

* Shakespeare, Meas. for Meas. Act iv. Sc. 3.

Suppose the sufferer, on the contrary, to have been a valuable member of society, and to have erred only from some momentary impulse of our imperfect nature; one, who in the recollection of reason hath found repentance; who resigns with chearfulness that life, which is become a forfeiture to the law, and looks up in confidence to heaven for that forgiveness which is not to be found on earth. The last foot-steps of such a man, are watered with the tears of his fellow-citizens; and we hear from the mouth of every spectator,

"Yes I do think, that you might pardon him,
And neither heaven, nor man grieve at the mercy."

I cannot dismiss this subject without expressing a doubt, relative to the propriety of punishing with death a return from transportation; especially where the original offence was not capital. It certainly is not justified by necessity; for it is easy, if requisite, to send the delinquent abroad again, without any considerable degree either of expence or trouble. Will it be said, that he deservedly suffers for the breach of a compact, which he is supposed to have made? In many instances the transportation is not in the nature of a conditional pardon, but directed by possitive law *; in no instance is such a compact reconcileable to the law of nature.

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* In support of this assertion I shall cite some authorities; *previously observing*, that, "exclusion from society is the proper punishment of those only, who are become objects of terror to their fellow-citizens in consequence of very heinous crimes, either not equivalent to the *ultimum supplicium*, or of which they have been convicted by disputable and unsatisfactory evidence."

By 6 Geo. I. c. 23. and 4 Geo. I. c. 11. any persons convicted of larceny either grand or petit, and entitled to clergy, may in the discretion of the court be directed to be transported to

On the whole, is not such severity inconsistent with that leading principle which forbids penal laws to attack the natural sentiments of the heart? "*Duri est non desiderare patriam. Cari sunt parentes, cari liberi, propinqui, familiares, sed omnes omnium caritates patria una complexa est: pro quâ quis bonus dubitet mortem oppetere?*

By stat. 20 Geo. II. c. 46. it is made a felony, without benefit of clergy, for rebels under sentence of transportation to go into France or Spain; and the same severity is extended to all the friends of such persons, keeping or entertaining any correspondence with them by letters, messages, or otherwise.

In the wording of this clause, there is not any saving of even the most innocent interchanges of friendship. Shall

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America for seven years; and if they return within that time, it shall be felony without benefit of clergy.

By stat. 10 Geo. II. c. 32. the penalty of transportation for seven years is inflicted on the second offence of stealing deer in any uninclosed forest; and for the first offence upon such as come to hunt there, armed with offensive weapons.

By 26 Geo. II. c. 19. § 11. persons convicted of assaulting any magistrate or officer, &c. in the salvage of any vessel or goods, are to be transported for seven years.

Ibid. c. 33. § 8. persons convicted of solemnizing matrimony without banns or licence, &c. shall be transported for 14 years.

Also by 5 Geo. III. c. 14. persons stealing or taking fish in any water within a park, paddock, orchard, or yard, and the receivers, aiders, and abettors, shall be transported for seven years.

I have not selected these as the *most* exceptionable instances; there are many others, in which transportation is inflicted upon offences by no means so heinous in their nature, as to require the extirpation of the criminal from the society of his fellow-citizens.

then the lawgiver infringe all the ties and privileges of humanity? Shall he point the sword of justice against the bosom of fidelity? To such a lawgiver I would say, "consult your own heart, and inflict not chastisement on actions, which a good mind cannot disapprove!"

I say nothing of bastinadoes, mutilations, and a variety of other modes of corporal punishment, equally inconsistent with decency and humanity: such refinements of cruelty put the whole species, rather than the criminal, to disgrace.

Artaxerxes moderated the severity of the laws of Persia, by enacting *; that the nobility who debased themselves, instead of being lashed, which had been the practice, should be stripped, and the whipping be given to their vestments; and that instead of having the hair plucked off, they should only be deprived of their high-crowned tiaræ.

The English constitution, ever anxious to preserve the virtuous pride of the people, hath used this branch of the penal code with a reserve so scrupulous, that it may almost be doubted, whether more attention hath not been shewn to the protection of this principle, than to the preservation of life: for corporal pains might certainly with good effect be substituted, in some cases, in the room of capital judgments.

The Roman law permitted the murderer to remain on the gibbet after execution, as a comfortable sight to the friends and relations of the deceased †.

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* Plutarch.

† *Ut et conspectu deterreantur alii, et Solatio sit cognatis interemptorum.* ff. 48. 19. 28. § 15.— A. D. 1741, when the English regency made an order to hang the murderer of Mr. Penny in chains, they inserted therein, "that it was on the petition of the relations of the deceased." St. Tr. vol. x. 39.

Nec furtum feci, nec fugi, si mihi dicat
Servus: Habes pretium; loris non ureris, aio.
*Non hominem occidi: Non pasces in cruce corvos**

The Mosaical law directed the body of the criminal buried on the day of his death, "that the land might n defiled †."

It cannot with any propriety be said, that there is i manity, but it may be doubted, whether there be wisdo the adoption, which the laws of England have made on point, of the rescripts of the emperors, in preference t command of Moses.

We leave each other to rot, like scare-crows in the he and our gibbets are crowded with human carcases. M not be doubted, whether a forced familiarity with sucl jects can have any other effect, than to blunt the sentin and destroy the benevolent prejudices of the people?

Even England, the seat of national liberty and benevol became the bloody scene of intolerance and persecution ministers of peace and christianity were the active disp of death and desolation; and the perpetrators of the malignant murders were clad in the *pure* mantle of religi

The accomplised and sentimental Sir Thomas Moore c Lutherans to be whipt, tortured and burnt alive in hi sence‡. Cranmer led Arians and Anabaptists to the

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* Horat. Epist. l. I. ep. xvi. 46. † Deuteron. xxi.

‡ It seems almost necessary to produce some instance in port of this assertion; and therefore I transcribe the foll from Bishop Burnet, on whose historical fidelity we may rel all transactions except those of which he believed himself t

Bonner, Bishop of London, tore off the beard of a weaver, who refused to relinquish his tenets; in another instance of the same kind, he scourged a man until his arm ached with the exercise; and held the hand of a third to the candle, to give him a specimen of burning, till the sinews and veins shrunk and burst. Even Wriothesly, the chancellor of England, directed a young and beautiful woman to be stretched on the rack, for having differed with him on the real presence; with his own arm he tore her body almost asunder, and caused her afterwards to be committed to the flames. In fine, infants, born at the stake, were thrown into the fire with their parents, as partaking of the same heresy.

Human nature appears detestable under such representations; which (as they are well described by a philosophical writer) sink men below infernal spirits in wickedness, and below beasts in folly.

Henry the eighth, whose caprice was the bloody standard of the national faith*, ruled all sects by turns with a rod of iron: his scholastic subtlety was equal to his cruelty; and we are told, that, in one instance, he found sufficient reasons for

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been an eye-witness.—The clergy now resolved to make an example of one James Bainham a gentleman of the temple: he was carried to the Lord Chancellor's house, where much pains were taken to persuade him to discover such as he knew in the temple who favored the new opinions; but, fair means not prevailing, More made him be whipped in his presence, and after that he sent him to the tower, where he looked on, and saw him put to the rack." Bainham was afterwards burnt. Hist. of the Reform. vol. I. p. 165.

* It was made high-treason *to believe* this Prince to have been married to Anne of Cleves.

sending three papists, with three protestants, their companions, in the same procession to the stake. His daughter, Mary, with less ingenuity, possessed the same rancorous and implacable zeal. And we accordingly learn, that in the space of three years, under the auspices of Bishop Gardiner, she committed two hundred and seventy seven protestants to the flames. Human sacrifices were at this period more frequent in the metropolis of England, than they had ever been in either Carthage or Mexico: and in all these instances, the future damnation of the heretic was believed to be the inevitable consequence of his death.

Ye rev'rend fathers,
Whose beards the silver hand of time had touch'd,
Whose learning, and good letters peace had tutor'd,
Whose white investments figur'd innocence,
The dove and very blessed spirit of peace,
Wherefore did ye so ill translate yourselves
Out of the speech of peace, that bears such grace,
Into the harsh and boist'rous tongue of war,
And civil massacre? who shall believe
But ye misus'd the rev'rence of your place
Under the counterfeited zeal of God *,
In deeds most damnable †?

This frenzy had subsisted here for more than a century ‡: I find the following account of the execution of Lord Cobham, A. D. 1418.

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* *Deorum numen prætenditur scelcribus.* Liv. xxxix c. 16.

† Shakespeare.

‡ But it appears, from Godfridus Coloniensis, who wrote A. D. 1234, to have prevailed much earlier on the continent. "Eodem die, quo quis accusatus est, seu juste, seu injuste, nullius appella-

" Than was he layd upon an hurdle, *as though he had been a moost heynouse traytoure to the crowne*, and so drawne forth into Sainct Gyles Felde, wheere as they had set up a new paire of galowes. Than he was hung up in a chayne of yron and so consumed alyve in the fyre, *and so he departed hence moost christenly*. How the priestes that tyme fared and cursed, requiring the people not to pray for hym, but to judge hym dampned in hell, for that he departed not in the obedience of the pope, it were too long to wryte. And thy was done in the yeare of our Lord, MCCCC and XVIII*.

I have given this detail of historical facts, merely as a subject of curious speculation. The banners of pious cruelty seem now to be for ever laid aside. Philosophy and benevolence are become the companions of religion.

If stealing furniture, above the value of twelve-pence, from lodgings, require the punishment of death †; the plundering of wrecks, aggravated as it is by the unfeeling neglect of that sacred respect which is due to the unfortunate, certainly is not entitled to mercy. But arguments from analogy, lead to bloody consequences in the framing of penal laws. By the code of the Visigoths, he, who took the opportunity of fire or shipwreck to steal goods, was obliged to restore four-fold ‡.

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tionis, nullius defensionis refugio proficiente, damnatur, et flammis injicitur." This was founded on the following constitution of the emperor Frederic: Damnati per ecclesiam judici sæculari relinquentur, animadversione debitâ puniendi clericis a suis ordinibus primo degradatis." See also Matt. Paris, p. 429. and Hales Hist. P. C. i. 383.

* See the trial and examination of Sir John Oldcastle collected by John Bale.

† 3 and 4 W. and M. c. 9. ‡ L. vii. tit. 2. § 18.

The above mentioned act hath made it a capital offence to put out false lights, with intention to bring any ship into danger. The crime is undoubtedly heinous in its nature, and may be dreadful in its consequences; but the punishment of death should be inflicted rarely, and with great caution, upon the intention, where it is not followed by its effect. It was thought sufficient to punish the destroyer of stated sea-marks with a penalty of 100*l.* or outlawry *.

I shall only add, that, by the last act on this subject†, "*the alteration of a farthing with intention to make it pass for a sixpence, is high-treason in the offender, his aiders, and abettors.*"

The idea, of what Bodin affectedly calls, the harmonious proportion of punishments, should never be forgotten in acts of penal legislation. It is merciless and absurd, to impute the same guilt, and give the same chastisement, to the leader of a rebellion, and the diminisher of a piece of money.

This extravagant idea seems to have existed in the common law of England; and probably derived its origin from the law of the Romans. *Cudendæ pecuniæ obnoxii Majestatis crimen admittunt, et omni dilatione remotâ Flammarum exustionibus mancipentur* ‡:" and again, "*Quicunque nummos aureos partim tinxerint, partim finxerint, vel raserint, si quidem liberi sunt, ad bestias dari; si servi, summo supplicio affici debent.*" Such were the expressions of Theodosius and Justinian; but no early authority can justify the consequences of their import, which will be best described in the words of an eloquent and humane modern writer. "This

* 8 Eliz. c. 13. § 4.

† 16 Geo. II. ‡ Cod. ix. 24. 2.

confounds the distinction and proportion of offences, and by affixing the same ideas of guilt upon the man who coins a leaden groat, and him who assasinates his sovereign, takes off from that horror, which ought to attend the very mention of the crime of high-treason, and makes it familiar to the subject."

Having now, upon the principles of justice and necessity, examined the crime of high-treason, both as actually considered by the positive laws of different countries, and as it ought to have been considered by those laws; I shall endeavour to pursue the same method as to the degrees of punishment, which have been, and which ought to be, adapted to it.

Here we have a melancholy instance, how much the recollection of humanity may be insensibly stifled in the warmth and resentments of self-love. The crime, being personally and immediately against lawgivers and legislation, hath engaged the full exertion of ingenuity and power, to make its punishment as immoderate, and as complicated as possible.

It would be a painful task to describe the executions of Ravaillac, and of Damiens; neither is it necessary to refer to the executive justice of foreign nations. I shall confine myself on this point to the practice of England, which cannot be stated better, than by an extract from the authoritative, and nervous description of Sir Edward Coke; who, with great profusion of learning, and a total want of common benevolence *, enters into the following discussion in the presence

* Those, who are anxious to apologize for Sir E. Coke, will say, that the crime, of which those men stood accused, was perhaps the most horrid that ever entered into the heart of man; this apology might have some weight, if his harangue had been rather *after* conviction, than *before*.

and hearing of seven unhappy men, who were about to undergo this sentence full of horrors *.

"These traitors have exceeded all others their predecessors in mischief; yet his majesty in his admirable clemency and moderation, will not invent any new tortures or torments for them; but hath been graciously pleased to afford them as well an ordinary course of trial, as an ordinary punishment, much inferior to their offence. And surely worthy of observation is the treatment by law provided and appointed for high-treason.

"For first, the traitor shall be drawn to the place of execution, as not being worthy any more to tread upon the face of the earth, whereof he was made; and with his head declining downwards, and as near the ground as may be, being thought unfit to take the benefit of the common air.

"He shall next be hanged up by the neck between heaven and earth, as deemed unworthy of both or either, as likewise that the eyes of men may behold, and their hearts contemn him. Then is he to be cut down alive, and to have his parts of generation cut off, and burnt before his face, as being unworthily begotten, and unfit to leave any race after him. His inlayed parts shall be also taken out, and burnt; for it was his heart, which harboured such horrible treason. His head shall be cut off, which imagined the mischief; and lastly, his body shall be quartered, and the quarters set up in some high and eminent place, to the view and detestation of men, and to become a prey for the fowls of the air. And this is the reward due to traitors; for it is the physic of government, to let out corrupt blood."

* State trials, vol. i. p. 235.

It hath been affirmed, both with respect to nations and individuals, that the sentiments of benevolence bear a general proportion to the progress of science; but the name of Sir Edward Coke will not be cited in support of this observation. With great acuteness and depth of learning, he retained through life, a hard, unpitying nature; that brutal insolence which is so often produced in narrow minds, by undeserved or unexpected prosperity, marked all his actions. His learning, indeed, was not of that kind which we call *literæ humaniores*; but it would be an inference, highly injurious to the profession, to suppose, that the practice of law blunts the sensibility of the mind.

As to the punishment inflicted by our law on high treason, which occasioned this digression; it appears formerly to have been a part of the judgment*, that the convict should be drawn upon a hurdle; but an instance is recorded †, in which Shard, justice, ordered, that nothing should be brought, whereupon he should be drawn, "*mes que sans cley, ou autre chose a desouth lui, soit tray de chivaux, hors de la sale, ou il avoit judgment, tanque a les furcs, &c.*" It was also a part of the ancient judgment ‡, "*que les privies membres soient excises de son corps, et combuiés deins son vieu:*" but this was omitted by Lord Hardwicke in the judgments passed upon the four Lords in the year 1746‖; and in a former case had been thought unnecessary §. Still, however, the criminal must be ordered to be cut down alive. For upon a

* Staunford, l. iii. c. 19. p. 182. It is remarkable, however, that before the time of Henry VII. there were hardly two judgments, of which the form was the same. See Carthew's Reports, p. 349. Walcot's case.

† Ass. xxxiii. 7. Hales Hist. P. C. i. 382.

‡ Staunford, iii. 19.

‖ State trials, vol. 9.

§ Lord Raymond, p. 1.

writ * of error, to reverse an attainder, in the 8th. of W. III. it was assigned for error, that the court had only directed, "*quod interiora sua extra ventrem suum capiantur, et in ignem ponantur,*" omitttng "*ipso vivente,*" or "*in conspectu ejus;*" and it was said by Lord Chief Justice Holt, that, "though this omission be for the benefit of the party attainted, yet still it is error, *for the judgment in all capital cases is stated and settled by the common law, which no court can alter.*" The attainder was thereupon reversed, and the reversal was affirmed in parliament †.

It is certain, that the crime of high-treason is often of such a tendency, as to require the *ultimum supplicium*, or, in other words, the extirpation of the criminal.

But when we are constrained to have recourse to that fatal extremity, it should always be observed, that whatever exceeds simple death is mere cruelty. Every step beyond is a trace of ancient barbarity, tending only to distract the attention of the spectators, and to lessen the solemnity of the example. There is no such thing as vindictive justice; the idea is shocking. Public utility is the measure of human punishments; and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is lost in sympathy with the superfluous sufferings of the criminal, the example loses its efficacy, and the law its reverence.

A nation, familiarized and reconciled to the execution of the English sentence in cases of high-treason, would probably consist of a pusillanimous and despicable people; cruelty and cowardice are inseparable.

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* Walcot's case, 12 Mod. 95, 96.

† Mich. 11 W. III. Shower's Parl. Cases, p. 127.

I have expressed the more anxiety on this subject of burglary, because the selfish sensibilities of mankind may be too apt to excite an incautious indignation against the persons accused thereof; and because the lists of capital executions shew it in fact to be peculiarly fatal to Englishmen.

If the existence of those who are convicted of this offence be really dangerous to the safety of society, it is certainly both justifiable and proper to punish them with death; but this criterion of severity ought most strictly to be regarded.

It cannot be too strongly inculcated, that capital punishments, when unnecessary, are inhuman, and immoral; an observation very applicable to the punishment, inflicted by our laws on the crimes, which I am next to mention.

Private larceny from the person, of any money or goods above the value of twelve pence, is deprived of the benefit of clergy by the 8th. Eliz. c. 4 *, "that the fraternity or brotherhood of cutpurses and pickpockets" (as they are described in the preamble) "may not continue to *live idle* by the secret spoil of good and true subjects." A public and well regulated work-house would have been a more proper remedy for this offence. "The punishment of robbery, not accompanied by violence, should" (says Beccaria) "be pecuniary; he, who endeavours to enrich himself by the property of others, should be deprived of part of his own. But this crime, alas! is commonly the effect of misery and despair; the crime of that unhappy part of mankind, to whom the right of exclusive property hath left but a bare existence." It would be absurd then to extort pecuniary satisfaction from those, who are already struggling in the extremity of want; but there would be

* The reason assigned by L. C. J. Kelyng for the framing of this statute is not satisfactory. See Kel. p. 70.

no absurdity in the infliction of temporary imprisonments, with compulsion to labour; a mode of punishment, which, by inducing a habit of industry, and by the effects of that habit, would be equally beneficial to the criminal and the public.

Larceny from the house, whether privily committed without violence, or openly in the day time, and therefore in neither case amounting to burglary, is, nevertheless, by the laws of England, made capitally penal in almost every instance; and this by a multiplicity of statutes, so complicated in their limitations, and so intricate in their distinctions, that it would be painful, on many accounts, to attempt the detail of them. It is a melancholy truth, but it may, without exaggeration, be asserted, that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which, on this point, they are made liable.

A modern writer, whose book is peculiarly calculated for the general benefit of mankind, hath, by a diligent collation of the statutes to which I allude, reduced this chaos to some degree of order. I shall transcribe from his account, that the benefit of clergy is now denied upon the following supposed aggravations of larceny *; viz. "in all larcenies above the value of twelve pence from a church, or from a dwelling-house, or booth, any person being therein; in all larcenies, to the value of five shillings, committed by breaking the dwelling-house, though no person be therein; in all larcenies to the value of forty shillings from a dwelling-house, or its out-houses, without breaking in, and whether any person be therein or no; and in all larcenies to the value of five-shillings from any shop, warehouse, coachhouse, or stable, whether the

* Commentaries, B. iv. 220.

same be broken open or not, and whether any person be therein or no. In all these cases, whether happening by day or by night, the benefit of clergy is taken away from the offenders*."

These severities have, with great plausibility, been ascribed † to the increasing opulence of the kingdom; and indeed there seems sufficient reason to believe, that sanguinary laws are the probable consequence of national prosperity. Sensibility sleeps in the lap of luxury; and the legislator is contented to secure his own selfish enjoyments, by subjecting his fellow-citizens to the miseries of a dungeon, and the horrors of an ignominious death. Still, however, he feels a tacit disapprobation of the laws, which he hath enacted; and even, when injured, hesitates to bring the offender to justice. He knows, that the punishment is disproportionate to the offence; or, at least, if humanity be obliterated by interest, he foresees, that the punishment cannot be inflicted without raising the indignation of society against the accuser. The delinquent therefore is discharged without prosecution; he repeats the crime, under the expectation of repeated mercy; he becomes gradually familiar with dishonesty; and, at length, falls a victim to that preposterous severity of the law, which hath so long been the subject of his mockery. It is a property inseparable from harsh laws, that they are neither regular, nor expeditious in their execution; consequently, that they flatter the hope of impunity, and, equally injurious to the society and to the criminal, tend to the fatal multiplication both of crimes and of punishments.

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* Stat. 23 Hen. VIII. c. 1. 25 Hen. VIII. c. 3. 1 Edw. VI. c. 12. 5 and 6 Edw. VI. c. 9. 39 Eliz. c. 15. 3 and 4 W. and M. c. 9 10 and 11 W. III. c. 23. 12 Ann. c. 7.

† Observations on the ancient statutes, p. 375.

In fact, upon trials of larcenies so limited, it is commonly found to be the chief anxiety both of judges and of jurors, to reduce the crime below its real predicament, by reducing the conviction below the value affixed by law. Such an anxiety is the natural consequence of laws, which, by an absurd distinction, make a trivial difference between two sums the criterion of a capital crime; and enact, that a penny more or less shall be equivalent to the life of a man.

Forgery, which is defined to be the fradulent making, or alteration, of a writing, with intent to prejudice the right of another, is also a crime against property.

It appears to have been a species of the *crimen falsi* among the Romans; but it is rarely mentioned by them, or in the laws of other ancient nations; and the reason is obvious.

The increase of modern riches, the invention of paper, the many complex securities, and representations of property, the institution of national funds, and rules of written evidence, have all contributed to render forgery a consideration of great extent and importance. The offender, by 5 Eliz. c. 14, is punished with forfeiture to the party aggrieved, of double costs and damages; with standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; with forfeiture to the crown of the profits of his lands, and with perpetual imprisonment. *I have cited this statute*, which extends only to certain forgeries therein described, *merely as proper to be repealed.* At present, "the imitation of stamps in order to defraud the stamp office; the antedating of a deed of conveyance in order to over-reach a former deed; an alteration in the name and description of the premises conveyed, or in the sum of money secured by bond or other deed, or in the limitations of an estate intended to pass; all these acts, and others of the like nature, tending to establish a false and fraudulent title to property, whether in the name

of a real or fictitious person, are forgeries*: and there is hardly a case of this kind, possible to be conceived and described, which hath not, in the course of the present century, been made a capital crime. The statutes for that purpose are innumerable; for, exclusive of many general provisions, it is become usual, upon the issuing of new bills of credit, lottery-orders, army-debentures, &c. to add a special clause of forgery relative to the subject then in question. Here, therefore, if any where, may be applied the observation, *Pluit super populum laqueos legum accumulatio* †.

There is also a great variety of injuries against private property, which are in no degree fraudulent, but merely malicious; under this head the crime of Arson, which is capitally punished, is of the blackest dye, because destructive both of life and property. It hath, however, been thought expedient by the English legislature, to extend the same degree of severity to many mischiefs of very inferior criminality. Such are the offences of persons destroying turnpike gates upon roads, or posts, rails, or other fence, or fences, belonging to such turnpike gates, or the sluices, flood-gates, or other works of navigable rivers, of persons cutting any hopbinds growing in a plantation of hops; breaking down the head or mound of any fish-pond, whereby the fish are lost and destroyed ‡; *killing, maiming, or wounding any cattle*; such also is the

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* It is also a felony, without benefit of clergy, to make a false entry in a marriage register; to alter it when made; to forge or counterfeit such entry, or a marriage licence, or to aid and abet such forgery; to utter the same as true knowing it to be counterfeit; or to destroy, or procure the destruction of any register-book of marriages, or any part of such register-book, with intent to avoid any marriage. 26 Geo. II. c. 33. § 16.

† De Augm. Scient. ‡ Stat. 9 Geo. I. c. 22.

offence of wilfully and maliciously tearing, spoiling, cutting, burning or defacing the garments or cloths of any person or persons, which is in like manner made a felony, though within the benefit of clergy *. If the legislature had no given repeated and deliberate proofs of a different sentiment, the punishment of death would seem by no means applicable to delinquencies which are merely in the nature of civil trespasses.

It is felony without benefit of clergy, to remain one month in the realm, being an Egyptian; or to be found in the fellowship of Egyptians; and Sir M. Hale takes notice, that thirteen persons were executed for this offence in one assize at Bury. It is equally capital, if any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner †; or shall maliciously cut in pieces or destroy any manufacture of linen cloth or yarn, either when exposed to bleach, or dry ‡; or shall wander, being a mariner, without the testimonial of justices §, or shall knowingly receive, relieve, or maintain, Priests or Jesuits ‖; or shall, during the term of transportation to the British colonies, voluntarily go into any part of the French or Spanish dominions ¶; or shall be found in disguise in the act of passing with prohibited or uncustomed goods; or shall forcibly hinder, obstruct, assault, oppose, or resist, any of the officers of the customs, or excise, in the seizure of any such goods **.

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* 6 Geo. I. c. 23. which is intitled; "An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons." The clause relative to clothes *is to be found* in the last section.

† 12 Geo. I. c. 34. ‡ 4 Geo. III. c. 37. § 16.

§ 39 Eliz. c. 13. § 4.

‖ 27 Eliz. c. 2. § 4. ¶ 20 Geo. II. c. 46. § 1.

** 19 Geo. II. c. 34.

It would be easy to collect considerable additions to this dismal catalogue; but the instances already given, form a sufficient foundation for the following remark.

Positive laws are those, which do not flow from the general obligations of morality and the general condition of human nature; but have their reason and utility, in reference to the *temporary* advantage of that particular community for which they are enacted. Every law therefore, which comes under this description, ought to have a limited duration; and should not be suffered to remain a burthen upon the people, when the grievance, for which it was framed, hath ceased, and is forgotten.

The accumulation of sanguinary laws is the worst distemper of a State. Let it not be supposed, that the extirpation of mankind is the chief object of legislation. *Nous lisons de quelques empereurs de Maroc, qui uniquement, pour faire parade de leur addresse, enlevent d'un seul coup de sabre en se remettant en selle, la tête de leur ecuyer.*

When by Stat. Jac. I. it was made felony for any person infected with the plague, to go abroad or converse with company; it was impossible to object to a severity, which though fatal to individuals, was essential to the general safety of the people. But when in the 18th. century it is made a capital crime to cut down a cherry-tree in an orchard; the thinking part of mankind must listen to such a law with irreverence and horror: for they know that the evil to be prevented, is by no means adequate to the violence of the preventive.

Under this head it may be observed, that laws very severe in their nature, but originally not inconsistent with sound policy, are sometimes suffered to retain their force, long after their subject-matter hath ceased to be of any consequence to the

interests of society. Such for instance, is that statute*, under which it is at this day a capital offence to give corn, cattle, or other consideration, to the Scots for protection. It would be easy to produce many other instances equally exceptionable. And this is the necessary consequence of having given an unlimited existence to laws made for the correction of present evils. In the promulgation of such laws it should be observed, that they are founded in the momentary exigencies of society, and resembled that necessity, which in cases of extreme famine, obliges men to eat each other. They cease to eat men, in such cases, as soon as bread can be obtained †.

It is a political truth, that, *when the laws are good, those, who deserve punishment, rarely escape the arm of Justice.*

"Cur tamen hos Tu
Evasisse putes, quos diri conscia facti‡
Mens habet attonitos, et surdo verbere cædit,
Occultum quatiente animo tortore flagellum?
Pœna autem vehemens, ac multo sævior illis,
Quas aut Cæditius gravis invenit, aut Rhadamanthus,
Nocte dieque suum gestare in pectore testem§."

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* Stat. 43 Eliz. c. 13.

† See the French commentary on the M. Beccaria.

‡ The same idea is finely expressed by our own poet, who seems to have possessed the singular power of turning his genius to every train of ideas, of which the mind of man can be capable:

"Tremble thou wretch
That hast within thee undivulged crimes,
Unwhipt of justice; hide thee, thou bloody hand;
Thou perjur'd and thou simular man of virtue,
That art incestuous: Caitiff, to pieces shake,
That under covert and convenient seeming
Hast practis'd on man's life."

§ Juv. Sat. xiii. ver. 193.

It cannot have escaped the notice of my readers, that the ideas, which in the course of this inquiry I have endeavoured to establish as principles of penal law, have not been stated as abstract propositions; but rather as argumentative inferences, interwoven with, and to be collected from observations on the penal systems of different Governments. My attention hath at the same time been most particularly turned to the English code of laws; and many melancholy instances have concurred to show that the reformation of that code is become an important and almost necessary work. I know, that many will conceive such a reformation to be impracticable; I know, that the minds of some will startle at the idea of innovations; I know, that others will shrink from the supposed difficulty.—Yet I am convinced, that the undertaking is neither impracticable, unsafe, nor difficult*.

Under this conviction it hath been my object, by frequent appeals to reason and benevolence, to engage those sensible and good minds, which are ever ready to sympathize with him who pleads the cause of humanity. To excite the attention

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* The British constitution is the pride of every Briton: to secure, to fortify, to perpetuate that excellent system of government, is the business of every Briton. It may be pardonable therefore in me to point out what I conceive to be the best method of accomplishing the reformation in question; leaving the execution of that method or the adoption of a better plan, to those who lie under the more immediate engagements both of interest and duty.

The learned observer on the ancient statutes was certainly well founded in suggesting that a reformation of the English law can never be effectually carried on, without the assistance of able lawyers, not members of the legislature. With such assistance it might perhaps be easy to frame separate declaratory statutes rela-

of that more numerous class of men, who are distracted by the cares, heated by the action, or dissipated by the pleasures of the world, may be wished, but is not to be expected; though nothing is more certain than that the subject of these enquiries deserves the attention of every man amongst us. "For no rank, no elevation in life, no conduct how circumspect soever, ought to induce any reasonable man to conclude, that the penal system doth not, nor possibly can concern him*." A very slight reflection, on the numberless unforeseen events which a day may bring forth, will be sufficient to show that we are all liable to the imputation of guilt; and consequently all interested, not only in the protection of innocence, but in the assignment to every particular offence, of the smallest punishment compatible with the safety of society.

It must ever happen, that many private members of the state will regard the imperfections of the laws with indifference till they experience their effects. What in such men must be attributed to inability or neglect only, may in others, perhaps, deserve the appellation of a breach of trust. Be this as it may; it highly concerns the safety of every individual, as well as the general morality and happiness of the people, that the inno-

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tive to each class of crimes, comprehending all the descriptions and degrees of each crime, with their proportionate punishments. Every such declaratory statute should be attended by a supplemental bill, repealing all prior provisions relative to the class of crimes, in that statute contained. It seems superfluous to point out the many collateral good effects which might arise from this method of seeking the end proposed.

The repeal of particular statutes, without such preparatory caution will be found a mere palliative remedy; which may tend indeed to awake the symptoms of the disease, but from which a radical cure cannot be expected.

* Foster's Crown Law, Pref. p. 3.

cent be protected against unmerited severities, and that the guilty be conducted with certainty, to punishments proportionate to their crimes.

These ends can be attained only when the penal system is good. Under such a system they who offend against the laws, and they only, have reason to fear; whilst those happier members of society, who deserve security, enjoy it in the full perfection to which the rectitude of their conduct hath entitled them.

KELYNGE'S REPORTS, 28.

Vid. 9—9, 4, 28.—One demands his clergy, and the court took the book and turned him to a verse, and he could not read well, but read one word in one place, and another word in another place. And the judges asked the ordinary if he would have him; and he answered yea. The judges bid him consider, and told him the court was judge of his reading, and if the court should judge he did not read, the ordinary should be fined, and the prisoner hanged, notwithstanding his demanding of him, and he was hanged.

THE PARLIAMENTARY REGISTER,

OR

HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS, AT THE SIXTH SESSION OF THE SEVENTEENTH PARLIAMENT.—*Vol. XLIV.*

Lond. J. DEBRETT, 1796.—Page 288.

Friday, 11th. of March.

MR. JODDRELL rose, to move for leave to bring in a bill for giving for anatomization the bodies of persons executed for burglaries and felonies. Mr. Buxton seconded the motion.

Serjeant Adair said, he now rose to oppose the bill in the present stage, as he would in every subsequent one, should it be allowed to proceed any farther; and he hoped he would be able to show that it was essential to the dignity of parliament, and to the advantage of the public, not to encourage for a moment a measure from which so much evil would result. It had been an observation made by all versant with the criminal justice of this country, that the great defect of our criminal code consisted in confounding the gradations of crimes, removing the distinction of enormity, and the proportion of their punishment. He could not think of adding, as the proposed bill would do, to the severity of the punishment of death, in cases where the punishment of death ought not to be inflicted at all. In the various cases of burglary the same punishment was provided by the law. A ragged boy on the 21st of December last, cutting a hole in a pane

of glass, and drawing out a pair of garters to the value of twopence would be found guilty of burglary, and by the law punished with death. Was the person who took only a few shillings, without committing any violence, to be compared to the nocturnal, way-laying murderer? Were the obvious moral distinctions of these crimes to be confounded and held forth to the people, as meriting the same severity of punishment? He thought that the distinction which the bill meant to extend to other crimes, should be reserved as the peculiar attendant of the punishment of murder, with regard to which it was wise to maintain a greater degree of horror and dread. The disgraceful multiplicity of crimes already punished with death, was no reason for affixing an additional mark of severity. He was not such an enthusiast for the promotion of the science of anatomy, as to advance it at such a price, and by such means. The other object might be a good one; but he could not, to promote it, consent to break down that barrier, which God and nature had established between murder and other crimes. This bill might contribute to increase murder, by removing one great motive to deter criminals from committing it, when they committed the crime of robbery. Upon the whole, the proposed bill appeared so exceptionable, that he could not think the house would be disposed at all to entertain it. He had now only said a few words against it; but, if necessary, he would afterwards state his objections at greater length.

The motion was rejected without a division.

EXECUTION

OF

ANN HURLE,

(FROM ONE OF THE NEWSPAPERS,)

INSERTED TO EXPLAIN THE EFFECT PRODUCED BY THE PUNISHMENT OF DEATH FOR DIFFERENT CRIMES.

ANN HURLE, lately convicted of a forgery on the Bank. About ten minutes after eight o'clock, this unfortunate young woman, and *Methusalah Spalding*, were conveyed in a cart, from the felon's door, at Newgate, to the place of execution. She was dressed in black, appeared pale, and incapable of regarding with attention the horrors of her situation; her appearance on the whole was very interesting. When the halter was fixed, she seemed inclined to speak, but her strength evidently failed, and she was incapable. The other prisoner assumed an aspect, that excited the disgust of the populace; his hat remained on, and his behaviour was such as did not accord with the dreadful state in which he then stood. The Ordinary of Newgate accompanied the prisoners, and was attended to with earnest devotion by *Ann Hurle*, whose appearance, upon the whole, excited emotion of compassion among the spectators, who became at last so clamorous, that the sheriff, in a loud voice, described to them the impropriety of their behaviour, after which they were more silent. The caps having been pulled over the faces of the sufferers, the cart drew away.—As it was going, she gave a scream, and for two or three minutes after she was suspended, appeared to be in great agony, moving her hands up

and down frequently. For eight days she had taken but little nourishment, and her feelings, while attending the condemned sermon, preached on Sunday, were so great, that she was several times deprived of sensation, and supposed to be dead. Her father, mother, and other relations, were with her, during the gloomy hours of sadness that preceded her fate, the whole of whom she embraced for the last time. A petition was presented to his majesty in her behalf; and an answer was returned, that she need not entertain hope of mercy, her crime being of that magnitude that admitted of no other alternative than the execution of the law. After the bodies had hung the usual time, they were taken down, placed in shells, and delivered to their friends. The gallows, upon this occasion, was erected upon a new construction, at the upper end of the Old Bailey, near St. Sepulchre's Church. It is in the form of a triangle, and is to be used instead of the old drop. The numerous spectators commisserated the sad fate of *Ann Hurle;* while that of *Methusalah Spalding*, executed at the same time for an unnatural crime, excited sentiments of a very different description.

DUMONT.

Published in the Year 1799.

After having considered offences as *diseases* in the body politic, we are led by analogy to consider, as *remedies*, the modes of preventing and repairing them.

These remedies may be arranged under four heads:

1. Preventive remedies,
2. Suppressive remedies,
3. Satisfactory remedies,
4. Penal remedies, or punishments.

Extravagant Punishments.

If the evil of the punishment exceed the evil of the offence, the legislator will have produced more suffering than he has prevented. He will have purchased the exemption from one evil, at the price of a greater evil.

Place two tables before you; one representing the evil of the offence; the other the evil of the punishment.

The evils produced by a penal law are, 1st. *The evil of coercion.* It imposes a privation more or less painful according to the degree of pleasure which may be given by the thing prohibited. 2dly. *The sufferings occasioned by the punishment*, when the offenders are punished. 3dly. *The evil of*

apprehension, suffered by him who has violated the law, or, who fears that he will be accused of having violated it. 4thly, *Evil of false prosecutions*: this inconvenience, attached to all penal laws, is particularly attendant upon obscure laws, and offences of imaginary evil: a general antipathy produces an alarming disposition to prosecute and condemn upon suspicions or appearances. 5thly, Derivative evil, suffered by the relations or friends of him who is exposed to the rigor of the law.

Such is the table of evil, or of the *expense*, which ought to be considered by the legislator every time he enacts a punishment.

Of the Proportion between Crimes and Punishments.

Adsit
Regula peccatis quæ pœnas irroget æquas;
Ne scutica dignum, horribili sectere flagello.
Hor. L. 1. Sat. 111. line 118.

Montesquieu perceived the necessity of a proportion between crimes and punishments: Beccaria insisted upon its importance: they however, have rather recommended than explained it. Let us endeavour to give the chief rules of this moral arithmetic.

First Rule.—*Let the evil of the punishment exceed the advantage of the offence.*

To prevent the offence, it is necessary that the repulsive motive should be stronger than the attractive motive: more

fear ought to be excited from the punishment, than desire from the crime.

Second Rule.—*The severity must be increased as the certainty is diminished.*

No person engages in crime, but from the hope of impunity: if the punishment consisted merely in depriving the offender of the spoil which he has gained, and this punishment were invariably inflicted, such crimes would no longer exist.

The more the certainty can be increased, the more the severity may be diminished.

Punishment ought to be inflicted soon after the crime is committed: the impression upon the mind is weakened by the distance: and the distance of the punishment adds to its uncertainty, by giving new chances of escape.

Third Rule.—*If two offences happen to concur, the most injurious ought to be subjected to the greatest punishment.*

Two offences may be said to concur when a man has the power and the inclination to commit both.—A robber may content himself with robbing; or he may begin by assassination, and end by robbing. The assassination ought to be punished with greater severity than the robbery.

This rule would be perfect, if every portion of evil were attended by a correspondent portion of punishment. When the punishment for stealing ten pounds, is the same as for stealing twenty pounds, who would steal the smaller sum? An equal punishment for unequal offences is often a motive in favour of the greater offence.

Fourth Rule.—*The greater the offence, the more severe may be the punishment adopted for the chance of its prevention.*

Punishment is a certain expense for the purchase of an uncertain advantage: to apply great punishments to small offences, is to pay extravagantly for the chance of exemption from a trifling evil.

Fifth Rule.—*The same punishment ought not, without exception, to be inflicted for the same offence, upon different delinquents: but circumstances which influence the sensibility ought to be taken into consideration.*

The same nominal punishments, are not the same real punishments: age, sex, rank, fortune, and many other circumstances, ought to modify the punishment for offences of the same nature.

There is no necessity to weigh the proportion with mathematical precision, so as to render the laws subtle, complicated and obscure. Conciseness and simplicity are to be first considered. Something of the proportion may be sacrificed to make the punishment more awful, more adapted to excite a sentiment of aversion from vices which lead to crimes.

Of the Choice of Punishments.

A punishment, to adapt itself to the rules of proportion which we have established, should have the following qualities.

1. *It ought to be susceptible of increase and diminution*, so as to conform itself to the variations in the degree of

offences. The chronic punishments, such as imprisonment and banishment, eminently possess this quality. They are divisible into portions of different magnitude. It is the same with respect to pecuniary punishment.

2. *Uniform.*—It is necessary that, a quantity being given, it should be the same to different offenders guilty of the same offence, so as to correspond with their different degrees of sensibility. This requires attention to be paid to age, to sex, to condition, to fortune, to the habits of individuals, and to many other circumstances; otherwise the same nominal punishment, being too great for one, too small for another, may exceed or fall short of its object. A fine fixed by the law, can never be an uniform punishment, according to the difference of fortunes. Banishment may be attended with the same inconvenience: for one too severe; for another too mild.

3. *Commensurable.*—If a man have two offences in contemplation, the law ought to give him a motive to abstain from the greatest. He will have this motive, if he can see that the greatest offence will draw down upon him the greatest punishment. It is necessary then that he should be able to compare these punishments with each other, to measure their different degrees.

There are two modes of attaining this object. 1st. By adding to a certain punishment another quantity of the same sort; for instance, to five years imprisonment for such an offence, two years more for such an aggravation. 2dly. By adding a punishment of a different kind; for instance, to five years imprisonment for such an offence, a public ignominy for such an aggravation.

4. *Analogous to the offence*, the punishment will imprint itself on the memory, it will present itself more forcibly

to the imagination, if it have a resemblance, an analogy, a common character with the offence. The law of retaliation is admirable in this respect, "eye for eye, tooth for tooth," &c. the most dull understanding is capable of connecting these ideas. But retaliation is rarely practicable, and, in many cases, it would be a punishment too expensive.

There are other modes of analogy. Search, for instance, for the motive in which the offence originated: you may generally encounter the ruling passion of the delinquent, and may, according to the proverbial expression, punish him in the offending part. The offences of avarice will be properly punished by pecuniary punishments, if admissible from the situation of the delinquent :—offences of insolence by humiliation :—offences of laziness, by labour or compulsory inactivity *.

5. *Examplary.*—A real punishment, which is not an apparent punishment, is lost to the public; the great art consists in augmenting the apparent punishment, without augmenting the real punishment. This is attained either by the choice of the punishments, or by the striking solemnities attendant upon their execution.

The *Auto de Fé's* would have been one of the most useful inventions of jurisprudence, if instead of being for acts of faith, they had been for acts of justice. What is a public

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* Montesquieu has suffered himself to be dazzled, when, from a single perception of this quality in punishments, he thought that all arbitrary punishment might be taken away. "It is the triumph of liberty," he says, "when criminal laws derive each punishment from the particular nature of the crime: all that is arbitrary is at an end: the punishment does not depend upon the caprice of the legislator, but upon the nature of the thing; and it

execution? it is a solemn tragedy which the legislator presents to the assembled community; a tragedy truly important, truly pathetic, by its sad reality, and by the grandeur of its object; the dress, the scene, the decorations, cannot be too much studied, because the principal effect depends upon them. The tribunal, the scaffold, the robes of the officers of justice, the garments of the culprits themselves, religious ceremonies, retinues of all sorts, every thing ought to bear a serious and mournful character. Why should not the executioners themselves be covered with a mourning crape? it would augment the terror of the scene, and protect these useful servants of the state from the unjust hatred of the people. If the illusion be undiscovered, the whole might pass in effigy. The reality of punishment is necessary only to support the appearance.

6. *Economical.*—The punishment ought to be economical; that is, it ought to have only the degree of severity which is absolutely necessary for attaining its object. Every thing which exceeds the necessity is not only so much superfluous evil, but produces a multitude of inconveniences that defeat the ends of justice.

Pecuniary punishments possess this quality in an eminent degree, because all the evil felt by him who pays, converts itself into advantage for him who receives.

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is not man that commits violence upon man."—L. xii. chap. 4. The same page contains a striking example of the errors into which he is led by this false idea: for offences against religion, he proposes religious punishments; that is to say, punishments which shall have no effect; for to punish sacrilege, in an impious man by expulsion from the church, is not to punish him; it is to take from him a thing upon which he sets no value.

7. *Remissible.*—The punishment ought to be remissible. tis requisite that the suffering should not be absolutely irrepa- ible in cases in which it may happen to be discovered, that it as inflicted without lawful cause. So long as proofs are sus- ptible of imperfection, so long as appearances may be deceit- l, so long as men have no certain criterion for distinguishing ith from falshood, one of the first securities which they ciprocally owe to each other, is not to admit, without abso- te necessity, punishments absolutely irreparable. Have we t seen all the appearances of the crime heaped upon the ad of the accused, where innocence has been proved when was too late to do more than lament over the errors of a pre- mptuous precipitation? Feeble and short sighted as we are, judge as limited beings, and punish as if we were infallible.

1. To these important qualities of punishment, three other ialities, of less extensive utility may be added, and which ight not to be neglected if they can be attained without jury to the great object of example. It is one quality of nishment to be able to *serve in reforming the delinquent;* do not say only by the fear of a repetition of the punish- ent, but by a change in his character and in his habits. Ve shall attain this end by discovering the motive which roduced the crime, and by applying a punishment which nds to enfeeble this motive. A house of correction for this rpose should be separated for delinquents of different asses; to that different modes of education may be adapted their different moral states.

2. *To take away the power of injuring.*—This is an end hich may be more easily attained than the correction of de- nquents. Mutilations, perpetual imprisonment, have this fect: but the spirit of this maxim leads to an excessive gour in punishment. To this may be traced the frequency capital punishment.

If cases can be found in which the power of injuring can be destroyed only by taking away life, they are very extraordinary cases; for instance, in civil wars, when the name of a chief, so long as he lives, is sufficient to inflame the passions of a multitude: and even death, applied to actions of such a problematical nature, should be considered rather as an act of hostility than as a punishment.

3. *To furnish a recompence to the injured party* is another useful quality in a punishment. This is a mode of producing two effects at the same time; to punish an offence, and to repair it; to take away all the evil of the first order, and to tranquillize all the alarm. This is a characteristic advantage of pecuniary punishments.

I shall conclude this chapter with a general observation of great importance. *In the choice of punishments the legislator ought carefully to avoid those which offend established prejudices.* If a decided aversion be formed in the mind of the people, against any kind of punishment, although it possess every other requisite quality, it ought not to be admitted into the penal code, because it will produce more evil than good. At first it is an evil to inflict the public with a painful sentiment by the establishment of an unpopular punishment. It is not the guilty alone whom it punishes: but the most innocent and mild members of the community endure a very real although nameless punishment, in the wounds which violence and tryanny inflict upon their sensibility. What can result from conduct so little founded in judgment, but that the contempt, shewn by the legislator for the public sentiments, is secretly reflected upon himself? He loses the assistance voluntarily lent by society to the execution of a law which it approves; it has the people no longer for an ally, but an enemy: some endeavour to facilitate the escape of the guilty; others are scrupulous with respect to prosecuting; wit-

hesses are unwilling, and suppress the truth: a baneful prejudice insensibly increases; whilst shame and reproach are attached to the execution of the law. The general dissatisfaction may be carried to a greater extent: it sometimes bursts forth into open resistance either to the officers of justice, or to the execution of the sentences. Success against authority appears to be a victory to the people; and the unpunished delinquent triumphs over the feebleness of the humiliated laws.

It is by the bad choice of punishments that they are almost always rendered unpopular. The more the penal code is conformable to the rules which we have laid down, the more it will insure the enlightened esteem of intelligence, and the sentimental approbation of the multitude. Punishments so framed will be found to be just and moderate: we shall above all be struck with their fitness; with their analogy to the offences; with that scale of gradation, in which we shall see an aggravated offence correspond with an aggravated punishment, an extenuated offence with an extenuated punishment. This kind of merit, founded upon domestic and familiar notions, is intelligible to the meanest understanding. Nothing is more proper to give the idea of a paternal government, to inspire confidence, and to make the public opinion go hand in hand with authority. When laws are approved by the people the chances of escape are reduced to their lowest term.

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† This title, from page 216, instead of being DUMONT, ought to have been BENTHAM. The Extracts are taken from a work entitled "*Traités de Législation, par Mr. Jérémie Bentham. Jurisconsulte Anglois publiés en François par E. Dumont de Genève, d'après les manuscrits confiés par l'Auteur.*

EXAMINATION OF SOME COMMON PUNISHMENTS.

After examining 1st, Afflictive punishments: 2dly, Indelible punishments: and 3dly, Ignominious punishments, he proceeds to

Chronic Punishments.

Chronic punishments—Banishment, Imprisonment, are fit for many offences, but require particular attention to the circumstances which have influence upon the feelings: banishment, if inflicted without discrimination, is a very unequal punishment: its effect depends upon condition, and upon fortune: some have no cause of attachment to their country: others will be in despair upon being transported from their property and from their home: some have a family; others are unmarried and childless; to some it will be the destruction of every hope; to others an escape from creditors. The considerations of age and sex are also of great importance: for these reasons much must be left to the discretion of the judge.

The English, before the independence of America, were accustomed to transport to the colonies a numerous class of offenders: this transportation to some was slavery, to others a party of pleasure. A wretch, desirous to quit his country, would, to obtain a conveyance, commit a crime. The most industrious settled themselves in their place of exile: the most abandoned, unable to exist by robbery in a country where escape was impossible, soon returned to an ignominious death. Once condemned and transported, they were forgotten.

was interested in knowing whether they died of hunger
lisease? As example the whole was lost: the principal
was entirely neglected. This object is equally frus-
by the modern mode of transportation to Botany Bay:
tended with all the evils of punishment, and is without
its advantages.

at an absurdity, what a madness would it be to offer an
shment abroad by saying that it was a reward for crime!
ansportation must present itself to the mind of many in
s, as an advantageous offer of which they can profit only
kedness. Thus the law, instead of counteracting the
tion, frequently adds to its force.

o *prisons*, it is impossible to judge of the propriety of
nishment, until every thing which relates to their struc-
nd to their interior government is understood. Prisons
ral, contain every thing likely to pollute the body and
the mind. Examine them merely as the abodes of
ity: the faculties of the prisoners languish, and become
ted from disuse: their organs, no longer pliant, are para-
injured in their character, and interrupted in their
of labour, they are goaded by misery into crime:
under the subaltern despotism of persons, who are
lly depraved by the sight of wickedness and the prac-
tyranny, these unfortunate men may be exposed to a
nd unknown sufferings, by which they are embittered
; society, and hardened against punishment.

moral point of view, a prison is a school in which
arns, by the most certain means, that every attempt to
e virtue is vain and idle. Spleen, revenge and want,
e at this education of perversity. Emulation becomes
rent of crime. The ferocious inspires others with
city; the cunning, with his tricks; the debauched,
is licentiousness. Every thing that can debase the

heart and the imagination is the resource of their despair: united by a common interest, they mutually aid each other in shaking off the yoke of shame. Upon the ruins of social honour a false honour arises, composed of deceit, of intrepidity in opprobrium, of forgetfulness of the future, of enmity against the human race. It is thus that our unfortunate fellow creatures, who might have been restored to virtue and happiness, pride themselves upon the heroism of crime and the sublime of wickedness.

A criminal, after having completed his term in prison, ought not, without precaution and trial, to be restored to society: he ought not to be permitted to pass immediately from a state of inspection and of captivity to unlimited liberty; to be at once abandoned to all the temptations of loneliness, of misery, and of desire sharpened by long privation.

Capital Punishments *.

The more we examine the punishment of death, the more we shall be induced to adopt the opinion of Beccaria. This

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* *Peines capitales.*

Plus on examine la peine de mort, plus on est porté à adopter l'opinion de Beccaria. Ce sujet est si bien discuté dans son ouvrage, qu'on peut se dispenser de le traiter après lui. Ceux qui veulent voir d'un coup d'œil tout ce qu'on peut dire pour et contre, n'ont qu'à parcourir la table des qualités qu'on doit chercher dans les peines. (*Voyez chap.* 6.)

D'où peut venir la fureur avec laquelle on a prodigué cette peine? C'est un effet du ressentiment qui se porte d'abord vers la plus grande rigueur, et d'une paresse d'esprit qui fait trouver dans la destruction rapide des coupables le grand avantage de n'y plus

subject is so well discussed in his work, that there is scarcely any necessity for further investigation: they who are desirous to see at one view, all that can be said in favour and in opposition to it, have only to look at the table of qualities, which punishments ought to contain *.

The infliction of this punishment originated in *resentment*, indulging itself in rigour; and in *sloth*, which, in the rapid destruction of offenders, found the great advantage of avoiding all thought. Death! always death! this requires neither the exertion of reason, nor the subjugation of passion.

If it be said that death is necessary to prevent an assassin from repeating his crimes, it must be remembered, that, for the same reason, men who are insane and outrageous, from whom society has every thing to fear, ought to be destroyed. If we can ensure ourselves against these, why not against the others? If it be said that death is the only punishment which can prevail over certain temptations to commit homicide, it must be remembered, that these temptations can originate only in enmity or desire: must not these passions, from their very

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penser. La mort! toujours la mort! cela ne demande ni méditation de génie, ni résistance aux passions. Il ne faut que s'abandonner pour aller jusque là d'un seul trait.

Dira-t-on que la mort est nécessaire pour ôter à un assassin le pouvoir de réitérer ses crimes? Mais il faudroit, par la même raison, faire périr les frénétiques, les enragés, dont la société a tout à craindre. Si on peut s'assurer de ceux-ci, pourquoi ne pourroit-on pas s'assurer des autres? Dira-t-on que la mort est la seule peine qui puisse l'emporter sur certaines tentations de commettre un homicide? Mais ces tentations ne peuvent venir que d'inimitié ou de cupidité. Ces deux passions ne doivent-elles pas par leur propre

* Ante page, 219.

nature, dread humiliation, indigence, and captivity, more than death?

I should astonish my readers, if I were to expose to them the penal code of a nation, celebrated for its humanity and its intelligence; we might there expect to find the greatest proportion between offences and punishments; but, whatever may be our expectations, we should see this proportion continually violated, and the punishment of death inflicted upon the most trifling offences. The consequence is, that, the sweetness of the national character being in contradiction to the laws, the manners triumph and the laws are eluded: they multiply pardons, they shut their eyes upon offences, their ears to proofs; and the juries, to avoid an excess of severity, frequently fall into an excess of indulgence: the result is a penal system, which is incoherent and contradictory, which unites violence to feebleness, and, depending upon the humour of the judge, varies from circuit to circuit, being sanguinary in one part of the island, and merciful in another.

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nature redouter l'humiliation, l'indigence, et la captivité plus que la mort?

J'étonnerois les lecteurs si je leur exposois le Code pénal d'une Nation célèbre par son humanité et par ses lumières. On s'attendroit à y trouver la plus grande proportion entre les délits et les peines: on y verroit cette proportion continuellement oubliée ou renversée, et la peine de mort prodiguée pour les délits les moins graves. Qu'en arrive-t-il? la douceur du caractère national étant en contradiction avec les lois, ce sont les mœurs qui triomphent, ce sont les lois qui sont éludées: on multiplie les pardons, on ferme les yeux sur les délits, on se rend trop difficiles sur les témoignages; et les Jurés, pour éviter un excès de sévérité, tombent souvent dans un excès d'indulgence. De là résulte un système pénal incohérent, contradictoire, unissant la violence à la foiblesse, dépendant de l'humeur d'un Juge, variant de circuit en circuit, quelquefois sanguinaire, quelquefois nul.

This work contains various enquiries upon the prevention of crime.—In the chapter on the culture of benevolence† the author says,*

If the legislator be desirous to inspire humanity amongst the citizens, let him set the example; let him shew the utmost respect not only for the life of man, but for every circumstance by which the sensibility can be influenced. Sanguinary laws have a tendency to render men cruel, either by fear, by imitation, or by revenge. But laws dictated by mildness humanize the manners of a nation and the spirit of government.

The legislator ought to interdict every thing which can lead to cruelty. The barbarous spectacles of the gladiators, introduced in Rome towards the later times of the republic, contributed without doubt to give to the Romans that ferocity which they displayed in their civil wars. Will a people, accustomed to despise human life in its sports, respect it amidst the fury of passion?

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* Je vais proposer les moyens indirects par lesquels on peut influer sur, la volonté sons la forme de problêmes politiques ou moraux, et j'en montrerai la solution par divers exemples.

I. *Problème.* Detourner le cours des désirs dangereuse, et diriger les inclinations vers les amusemens les plus conformes à l'intérêt public.

II. Faire en sorte qu'un desir donné se satisfasse sans prejudice, ou avec le moindre prejudice possible.

III. Eviter de fournir des encouragemens aux crimes.

IV. Augmenter la responsibilité des personnes à mesure qu'elles sont plus exposées à la tentation de nuire.

V. Diminuer la sensibilité à l'égard de la tentation.

VI. Fortifier l'impression des peines sur l'imagination.

VII. Faciliter la connoisance du corps du délit.

† Chap. xvi. vol. 3.

In his chapter upon the power of pardoning, he says,

The severity of punishment must vary inversely as the certainty of its being inflicted.

What can be said of a power established to render punishment uncertain? such is, however, the immediate consequence of the power of pardoning.

In society, as with individuals, the age of passion precedes the age of reason. The first penal laws were dictated by anger and revenge. But when these barbarous laws, founded upon caprice and antipathies, begin to shock an enlightened public, the power to pardon, offering a protection against the rigour of sanguinary laws, becomes a comparative good; and is adopted without any examination of the evils entailed by this pretended remedy.

When laws are too severe, the power of pardoning is a corrective; but this corrective is a new evil. Enact good laws, and break the magic wand by which they are paralized. If the punishment is necessary, it ought not to be remitted: if it is not necessary, it ought not to be pronounced.

VIII. Empêcher un délit en donnant a plusieures personnes un intérêt a le prevenir.

IX. Faciliter les moyens de reconnoître et retrouver les individus.

X. Augmenter pour les delinquans la difficulté de l'evasion.

XI. Diminuer l'incertitude des procèdures et des peines.

XII. Prohiber les délits accessoires pour prevenir le délit principal.

Après ces moyens, dont l'objet est spécial, nous en indiquerons d'autres plus généraux, tels que la culture de la bienveillance, la culture de l'honneur, l'emploi du mobile de la religion, l'usage qu'on peut tirer de la puissance de l'instruction et de celle de l'education.—*Chap. iii. Vol.* 3.

HOWARD.

Published about the Year 1785.

TABLE I.

HOME CIRCUIT.

TAL ACCOUNT OF PRISONERS *Burnt in the hand—Whipped—Acquitted—Discharged by Proclamation*—or against whom *Bills* have been returned *Not found*—in the Counties of HERTFORD, ESSEX, KENT, SUSSEX, and SURREY, for seven Years, from the Year 1764 to 1770 Inclusive.

	Burnt in the hand.	Whipped.	Acquitted.	Discharged by Proclamation.	Bills not found.	*Total.*
HERTFORD	9	12	36	47	32	136
ESSEX	24	35	71	62	31	223
KENT	75	20	132	91	34	352
SUSSEX	11	15	23	16	4	69
SURREY	40	14	124	77	24	279
Total	159	96	386	293	125	1059

TABLE II.

An Account of the number of Prisoners Tried and *Acquitted*—of Prisone Convicted and Sentenced to be *Burnt in the Hand and Discharged*—of P soners Sentenced to be *Whipped and Discharged*—and of Prisoners *D charged by Proclamation*—at the several Assizes and General Gaol Deliveri held in and for the several Counties and Cities within the OXFORD CIRCU for Seven Years, ending at Michaelmas 1771.

		Yrs. 1765	1766	1767	1768	1769	1770	1771	Tot.
Gloucestershire.	Discharged by Proclamation.	5	5	5	4	8	7	2	36
	Whipped and Discharged.	1		1	1				3
	Burnt in the Hand and Discharged.		1		2		1	1	5
	Not Guilty Discharged.	22	17	16	20	10	10	21	106
City of Worcester.	Discharged by Proclamation.				1	1			2
	Whipped and Discharged.								
	Burnt in the Hand and Discharged.								
	Not Guilty Discharged.		2	2	1	1	1	2	9
Worcestershire.	Discharged by Proclamation.	5	2	6	7	10	7	7	44
	Whipped and Discharged.	2		3			1		6
	Burnt in the Hand and Discharged.	2		2	1		1		7
	Not Guilty Discharged.	14	18	14	13	12	7	8	85
Oxfordshire.	Discharged by Proclamation.	3	5	3	6	5	4	3	29
	Whipped and Discharged.	1		2	1				4
	Burnt in the Hand and Discharged.								
	Not Guilty Discharged.	6	8	16	11	7	5	8	56
Berkshire.	Discharged by Proclamation.	3	9	2	7	1	4	2	28
	Whipped and Discharged.		2	1					3
	Burnt in the Hand and Discharged.	2	1		2				5
	Not Guilty Discharged.	10	11	10	14	4	3	9	61

TABLE II Continued.

		Yrs. 1765	1766	1767	1768	1769	1770	1771	Tot.
Staffordshire.	Discharged by Proclamation.	6	7	8	7	8	3	6	— 45
	Whipped and Discharged.			3	1		1	5	—
	Burnt in the Hand and Discharged.	1	4	3		1	2		— 11
	Not Guilty Discharged.	11	22	20	22	10	7	20	— 112
Shropshire.	Discharged by Proclamation.	14	4	8	3	4	11	5	— 49
	Whipped and Discharged.				2	2	3		— 7
	Burnt in the Hand and Discharged.	5		1	3	1	1		— 11
	Not Guilty Discharged.	10	16	11	10	12	14	4	— 77
Herefordshire.	Discharged by Proclamation.	6	3	10	5	2	3	4	— 33
	Whipped and Discharged.								—
	Burnt in the Hand and Discharged.		4				1		— 5
	Not Guilty Discharged.	13	10	9	7	6	15	8	— 68
Monmouthshire.	Discharged by Proclamation.	2	1	2	2	3	4	6	— 20
	Whipped and Discharged.								—
	Burnt in the Hand and Discharged.	1			1	1			— 3
	Not Guilty Discharged.	7	2	3	6	7	5	5	— 35
City of Gloucester.	Discharged by Proclamation.		2		2		3		— 7
	Whipped and Discharged.								—
	Burnt in the Hand and Discharged.								—
	Not Guilty Discharged.	2				1	1	2	— 6

Total. Not Guilty Discharged - - 615
Burnt in the Hand and Discharged 47
Whipped and Discharged - - 28
Discharged by Proclamation - 293

Great Total 983

TABLE III.

An Account of the Number of Criminals *Condemned* to Death; *Executed;* and *Sentenced to Transportation;* with their respective Offences: from the Year 1750, to 1772, Inclusive; within the several Counties, &c. in the NORFOLK CIRCUIT.

	Petty Treason and Murder.	Burglary and House-breaking.	Robbery in Highways and Dwelling.	House-stealing, &c.	Forgery.	Returning from Transportation.	Six other Crimes.	Condemned to Death.	Executed.	Reprieved for Transportation.	Grand Larceny.	Petty Larceny.	Seven other Crimes.	Sentenced to Transportation.
1750	2	3	3	8				21	10	8	24	3		35
1751		6	4	6				16	12	12	24			36
1752	3	3	3	15	1		3	28	11	13	28	1	2	44
1753	2	4	2	11			2	21	6	10	18	1		29
1754		9	2	17	1		4	33	13	20	29	1	4	54
1755		2	4	7			1	14	2	9	20	1	1	31
1756		2	2	7			6	17	1	16	18	1		36
1757	1	8	5	11			2	27	6	12	34		1	46
1758		2	6	15			1	24	5	23	31	1	2	57
1759		2	3	8				13	3	15	12	2		29
1760		5	3	3				11	3	11	15		1	27
1761	1	1	2	2			2	8	2	4	13		1	18
1762	1	1	1	1	2	1	1	8	2	3	10			15
1763	3	3	1	5			1	13	5	6	19	1	2	27
1764		4	2	8		3	2	19	3	10	16	1	4	29
1765		4	2	14				20	1	19	29	1	2	52
1766	2	8	4	14			2	30	4	17	27		1	45
1767	2	6	2	14			6	30	5	38	34			72
1768		1	1	10			4	16	5	16	35	1	2	55
1769	2	9	1	4		1	1	18	6	11	22		2	34
1770		5	5	12		1	1	24	7	17	18			35
1771	1	4	1	6			4	16	5	11	30		2	43
1772		1	1	4			1	7		7	17		1	25
Tot.	20	93	65	202	4	6	44	434	117	308	523	15	28	874

TABLE IV.

An Account of the Number of Criminals *Condemned* to Death; *Executed;* and *Sentenced to Transportation;* with their respective Offences: from the Year 1750, to 1772, Inclusive; within the several Counties, &c. in the MIDLAND CIRCUIT.

	Treason.	Murder and Petty Treason.	Robbery.	Burglary.	House-breaking in Day-time.	Stealing Horses and other Cattle.	Forgery.	Returning from Transportation.	Six other Crimes.	Condemned to Death.	Executed.	Transported, viz. Capital Offences reprieved, Offences made transportable, Grand and Petty Larceny.
1750	1		6	4	3	16			2	32	5	50
1751		1	4	5		8				18	3	47
1752		1	2		1	16			3	23	3	45
1753			8	1	1	17	1		1	29	1	58
1754		1	3	1		20			4	29	4	63
1755		2	4	2	3	10			4	25	6	44
1756	2		1	4	1	17	1		4	30	6	44
1757			2	3	1	14		2		22	4	60
1758		1	5	5		19	1		4	35	6	54
1759		4	4		1	16	1	2	3	31	9	43
1760		1	1			12			1	15	2	32
1761	1	2	3	1	1	6			1	15	5	28
1762		2				8		1		11	4	28
1763		1	4	1	1	9	3	1	3	23	14	45
1764		3	6	1		14			1	25	11	63
1765		3	4	5	1	9				22	7	62
1766		1	4	2	4	12			3	26	4	63
1767		2	4	6		11				23	6	45
1768			2	2	1	17	1			23	2	49
1769		2	5	1		10			5	23	6	37
1770		2	3		1	6			1	14	4	45
1771				3		6			1	9	2	36
1772		1	5	2		11			1	20	2	21
Tot.	4	30	80	49	20	279	8	6	42	518	116	1057

TABLE V.

FELONS delivered from NEWGATE to be *Transported.*

SESSIONS.	London.	Middlesex.	Hick's Hall.	Westminster.	Tower Session.	Capital Respites.	*Total*
1773. January	10	19	3	6			38
February	8	24	9				41
April	16	24	19	14		20	93
May	10	29	14				53
July	14	49	6	5			74
September	11	24	9				44
October	10	17	3	6			4
December	10	15	9			17	51
	89	201	77	31		37	435
1774. January	4	18	3				25
February	16	33	7	3	1		60
April	15	24	17	13	1		70
May	6	22	2				30
July	14	22	12	8	4	30	90
September	22	16	10		2	1	51
October	8	8	6	5	1		28
December	14	22	16		1	13	66
	99	165	73	29	10	44	420
1775. January	9	29	14	9			61
February	9	20	7		2		38
April	19	17	12	4			52
May	5	9	2				16
July	6	11	7	5		20	49
September	14	20	6				40
October	9	10	7	4	2		32
December	8	9	7		1	11	36
	79	125	62	22	5	31	324
						Great Total	1179

TABLE VI.

ABSTRACT of SIR STEPHEN THEODORE JANSEN'S TABLE of *Criminals Condemned*; *Executed*; and *Pardoned* at the Old Bailey, LONDON, from the Year 1749, to 1771 both Inclusive.

		Condemned.		*Executed.*		*Pardoned, &c.*	
Peace	1749	61		44		17	
	1750	84		56		28	
	1751	85		63		22	
	1752	52		47		5	
	1753	57		41		16	
	1754	50		34		16	
	1755	39		21		18	
Peace			428		306		122
& War	1756	30		13		17	
War	1757	37		26		11	
	1758	32		20		12	
	1759	15		6		9	
	1760	14		10		4	
	1761	22		17		5	
	1762	25		15		10	
War							
&	1763	61		32		29	
Peace			236		139		97
Peace	1764	52		31		21	
	1765	41		26		15	
	1766	29		20		19	
	1767	49		22		27	
	1768	54		27		27	
	1769	71		24		47	
	1770	91		49		42	
	1771	60		34		26	
			457		233		224
	Total		1121		678		443

TABLE VI *Continued.*

The respective Offences.

	Murder.	House-breaking.	Highway.	Horse-stealing.	Forgery.	Coining.	Returning from Transportation.	Defrauding Creditors.	Shop-lifting, Riot, and 12 other Crimes.	To
Sentenced to death -	81	208	362	90	95	11	31	3	240	11
Executed - -	72	118	251	22	71	10	22	3	109	6
Pardoned, Transported, or died in Goal	9	90	111	68	24	1	9	0	131	4

Of the hundred and twenty Sessions in the fifteen Years Peace (eight in a Year) only one was Maiden; in 1749. the sixty-four Sessions in the eight Years of war, *nine* we Maiden.

Sir *Stephen* intending a list only of those who were co demned to die, has not in his table a column for transport co victs. But at the bottom of the sheet he notes that there we

Transported for seven or fourteen years - 5199

To which number he adds

Transported by the King's mercy (after receiving sentence of death) 401

Total Transports 5600

The second number of transports 401 is, doubtless, part the number 443, the last of the three totals above.

When I referred to this Table in *page* 9, I mentioned th the copper-plate was in my possession; I now add, that if an Gentleman, who has leisure and inclination to study the sul ject, is desirous of a copy, one is much at his service.

TABLE VII.

NUMBER of CONVICTS *Executed*, for LONDON and MIDDLESEX, during the last Twelve Years*.

	Murder.		*Coiners.*		*Various Crimes.*		*Rioters.*		*Total.*
	Men.	Women.	Men.	Women.	Men.	Women.	Men.	Women.	
From Dec. 1771 to Dec. 1772,	3		2		32				37
Dec. 1772 to Dec. 1773,	1 *burnt*	1	1		29				32
Dec. 1773 to Dec. 1774,		1			31				32
Dec. 1774 to Dec. 1775,	1		3		40	1			46
Dec. 1775 to Dec. 1776,	6		8		24				38
Dec. 1776 to Dec. 1777,	2		1		29				32
Dec. 1777 to Dec. 1778,	1		1		31				33
Dec. 1778 to Dec. 1779,	-		2 *burnt*	1	19	1			23
Dec. 1779 to Dec. 1780,	1		2		24	1	19	3	50
Dec. 1780 to Dec. 1781,	1		1		33	5			40
Dec. 1781 to Dec. 1782,					44	1			45
Dec. 1782 to Dec. 1783,			6		52	1			59
	16	3	27	1	388	10	19	3	467

* This table, together with Jansen's, gives the total number of executions for thirty-five years past.

TABLE VIII.

AN ACCOUNT of the Number of Prisoners convicted of Capital Crimes in SCOTLAND from 1st January 1768 to 1st May 1782.

*This mark * denotes a person pardoned; the rest were executed.*

	NORTHERN CIRCUIT.		SOUTHERN CIRCUIT.			WESTERN CIRCUIT.				
	EDIN-BURGH.	ABER-DEEN.	PERTH.	INVER-NESS.	JED-BURGH.	DUM-FRIES.	AYR.	GLAS-GOW.	STIR-LING.	*Crimes.*
1768	1									Forgery.
1769	*1							1		Horse-stealing. Murder and Robbery.
177	1	1								Murder.
	1									Street-robbery.
	1									Forgery.
	2	1			1					House-breaking and Theft.
										Sheep-stealing.
1771	1									Robbery.
	*1				*1					Murder.
					*1					House-breaking and Theft.
										Theft.
1772		*1	1							Child-murder,
								**2		Horse-stealing.
										House-breaking and Theft.
1773	1									House-breaking and Theft.
	2									Sheep-stealing.
	2									Murder and Robbery.
			1						*1	Horse-stealing.
			1	*1	1					Murder.
				1						Robbing the Mail.
				*2						Theft, Robbery, &c.
								2		Robbery.
									1	House-breaking and Robbery.
	14	3	3	4	4			5	2	35 *Total* Condemned.
	2	1		2	2			2	1	10 Pardoned.
	12	2	3	2	2			3	1	25 Executed.

TABLE VIII. Continued.

1774	*1 1	*1	1			*1				Horse-stealing. Sheep-stealing. House-breaking and Theft. Theft of Cattle. Rape.
1775			1					1		Murder. Theft.
1776	2 1	1	1		1			1		Robbery. Child-murder. Shop-breaking and Theft. Murder. Theft. Stealing a letter from Post-office.
1777									*1	Child-murder.
1778			1							Theft of Cattle.
1779				*1			1			Murder. Murder and Robbery.
1780	*2 *2 1		1			1	1			Robbery. Shop-breaking. Forgery. House-breaking and Theft. Murder by Poison. Theft from Post Office.
1781	*1 1						*2	1 1	2	Robbery. Theft from Post Office. House-breaking and Theft.
1782	1 1		1							Sheep-stealing. Robbery.
	18 7 11	2 1 1	6 6	1 1	1 1	2 1 1	4 1 3	4 4	3 1 2	41 *Total* Condemned. 12 Pardoned. 29 Executed.

Great Total Condemned 76
Pardoned 22
Executed 54

TABLE IX.

The following table is not from Howard, but is extracted from one of the Newspapers of the last year.

Number of Prisoners Tried, Convicted, Acquitted, and Executed, in England and Wales, in the Years, viz.				
	1805	1806	1807	Total.
Tried - -	4552	4315	4346	13,213
Convicted - -	2730	2484	2468	7,682
Acquitted - -	1822	1811	1878	5,531
Executed - -	68	57	63	188
Of these in London	10	13	14	37

Number of Prisoners Tried, Convicted, Acquitted, and Executed in Ireland, in the Years, viz:				
	1805	1806	1807	Total.
Tried - -	2013	1996	1956	5,965
Convicted - -	613	651	564	1,828
Acquitted - -	1400	1345	1312	4,137
Executed - -	42	42	55	139
Of these in Dublin	3	12	21	42

HOLLAND.

There are few criminals, except those in the *rasp-houses* and *spin-houses*. Of late, in all the seven provinces, seldom more executions in a year than from four to six. One reason of this, I believe, is the awful solemnity of executions, which are performed in presence of the magistrates, with great order and seriousness, and great effect on the spectators. I did not see the process in Holland; but it was particularly described to me, and was similar to what I had been witness of in another place abroad.

The common method of execution for unpremeditated murder, is decollation by a broad sword. Robberies are generally punished by the halter. For the more atrocious crimes, such as premeditated murder, &c. the malefactor is broken on the wheel; or rather on a cross laid flat upon the scaffold. But a description of the manner of this execution, which is finished by a *coup de grace* on the breast, would not be agreeable to any of my readers.

AMSTERDAM.

In the condemned rooms a criminal is never left alone: two prisoners from the rasp-house are always with him to prevent his destroying himself. They rejoice at the service; for if they discharge it faithfully, their reward is an abridgment of their allotted term. The execution is generally performed within forty-eight hours after sentence. From a book containing the names and crimes of all who have been executed at Amsterdam, from January 1693, to the end of 1766, the following *state of executions* at different periods is drawn.

From 1693 *to* 1735 (43 *years*) 288.
1736 -- 1745 (10 *years*) 20.
1746 -- 1766 (21 *years*) 28.

And I have been well informed, that in the eight years preceding my visit in 1783, only five criminals were executed; two of them were beheaded, one broke on the wheel, and two hanged.

LEEUWARDEN.

In the prison at LEEUWARDEN several were confined for petty offences; but there has been no execution for fourteen years past.

UTRECHT.

At UTRECHT, in 1776, no prisoners in the *Stadt-house;* in 1778, no debtors, and only one criminal, and his offence not capital: in 1781, no debtors; and out five offenders, two of whom were to be confined to bread and water; and in June 1783, only three prisoners. There has not been an execution for the city or province these twenty years.

HANOVER.

The execrable practice of torturing prisoners is here used, in a cellar where the horrid engine is kept. The time for it is, as in other countries, about two o'clock in the morning. A criminal suffered the Osnabrug torture twice about two years ago; the last time, at putting to him the third *question* (the executioner having torn off the hair from his head, breast, &c.) he confessed, and was executed. On such occasions a counsellor and secretary attend, with a doctor and surgeon, an *Osnabrug executioner*, and sometimes the gaoler. If the criminal faints, strong salts are here applied to him, and not vinegar, as in some other places.

AUGSBURG.

At AUGSBURG, the prison is on the side of a hill, at the back of the town house. It consists of many *cachots* or small rooms, on three different floors. There is one for examination, and two for the engines of torture. There are also two dark dungeons for such as have been convicted of witchcraft: but they are in a very ruinous condition, and seem to have been a long time without inhabitants.—The condemned are brought three days before their execution into two light rooms, which open into a Roman catholic chapel; where, however, if a prisoner be a Protestant, a Lutheran minister is permitted to attend him.

MUNICH.

At MUNICH or *Munchen*, there are two prisons for criminals. *One*, in the town-house, had in it six men and two women prisoners *. In a dark damp dungeon down seventeen steps, were the instruments of torture.

The *other*, *La Prison de la Cour*, consisted of about fifteen cells, twelve feet by seven, and a black torture room. In this room there is a table covered with black cloth and fringe. Six chairs for the magistrates and secretaries, covered also with black cloth, are elevated two steps above the floor, and painted black. Various engines of torture, some of which are stained with blood, hang round the room. When the criminals suffer, the candles are lighted; for the windows are shut close, to prevent their cries being heard abroad.

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* Once a year, *viz.* on All-saints day, any persons are permitted to enter and see the prison. There is a custom similar to this in Holland, at the *fair* time.

Two crucifixes are presented to the view of the unhappy objects. But it is too shocking to relate their different modes of cruelty. Even women are not spared *.

BRUNSWICK.

The *tower*, or prison for capital offences, is over one of the gates. It consists of three rooms, but none of them had been occupied for a considerable time. There had been no execution for fourteen years.

DENMARK.

At the entrance of many towns in DENMARK, a whipping-post stands conspicuous; on the top of which the figure of a man is placed, with a sword by his side, and a whip in his right hand †. Gibbets and wheels are also placed on emi-

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* This room seems much like the torture-room in Spain, described in *Limborch's History of the Inquisition*, translated by *Chandler*, vol. II. *page* 221, 4to. edit. "It was a large underground room, arched, and the walls covered with black hangings. The candlesticks were fastened to the wall, and the whole room enlightened with candles placed in them.—The inquisitor and notary sat at a table, so that the place seemed as the very mansion of death, every thing appearing so terrible and awful."

† Would not some public intimations of the punishment to follow crimes be useful also in England? Notwithstanding the numbers of fishermen and loose boys about Amsterdam, the Hague, and Schevelin, their public walks and beautiful plantations remain uninjured; which is owing, partly to the strictness of the police, and partly to the warnings given by *placarts* painted on boards, and hung up in different places, with representations of whipping, cutting off hands, &c.

nences, on which the bodies of malefactors are sometimes left after execution, to deter others from their crimes.

The place of execution is out of the *city*. Decollation is reckoned more honourable by the sword than by the axe. This is the common mode of execution; but of some more heinous crimes the punishment is breaking on the wheel; and in executing this on state prisoners, it has been the practice sometimes to begin with cutting off their right hands.—After the sentence of a criminal is confirmed, he is allowed time to prepare for death, from eight to fourteen days, as the chaplain attending him thinks necessary. He is confined in a cell (or dungeon) at night, but is allowed to be in an upper room in the day.

Executions are rare. A great number for *child-murder* are condemned to work in spin-houses for life, and to be whipped annually on the day when, and the spot where, the crime was committed. This mode of punishment is dreaded more than death, and since it has been adopted has greatly prevented the frequency of the crime.—The punishment for grand-larceny has been, since 1771, whipping and slavery for life.

FRANCKFORT.

The prison called *La Tour de St. Catharine* was empty. Here is a lightsome room, to which criminals are generally brought from the great guard prison, just before their execution. The men are hanged, and the women beheaded; but executions are very rare in this city.

SWEDEN.

The general mode of execution is by the axe. *Women* are beheaded on a scaffold, which is afterwards set on fire at the four corners, and consumed with the body. The present king

has humanely abolished all torture, and ordered a dark cellar applied to this purpose in the great prison, to be bricked up*.

RUSSIA.

There is no capital punishment for any crime but treason: but the common punishment of the *knoot* is often dreaded more than death, and sometimes a criminal has endeavoured to bribe the executioner to kill him. This punishment seldom causes immediate death, but death is often the consequence of it.

The governor of the police at PETERSBURG was so kind as to fix a time for shewing me all the instruments commonly used for punishment—the axe and block— the machine (now out of use) for breaking the arms and legs—the instrument for slitting or lacerating the nostrils—and that for marking criminals, (which is done by punctuation, and then rubbing a black powder on the wounds)—the knoot whip—and another called the cat, which consists of a number of thongs from two to ten. The *knoot* whip, is fixed to a wooden handle a foot long, and consists of several thongs about two feet in length twisted together, to the end of which is fastened a single tough thong of a foot and a half, tapering towards a point, and capable of being changed by the executioner, when too much softened by the blood of the criminal.

August 10, 1781, I saw two criminals, a man and a woman, suffer the punishment of the *knoot*. They were conducted from prison by about fifteen hussars and ten soldiers. When they arrived at the place of punishment, the hussars formed

* The gaoler told me, that agreeably to the king's order, the doorway had been bricked up. On my insisting to see the wall that I might be assured of the fact, I found the cellar still open.

themselves into a ring round the whipping-post, the drum beat a minute or two, and then some prayers were repeated, the populace taking off their hats. The woman was taken first; and after being roughly stript to the waist, her hands and feet were bound with cords to a post made for the purpose, a man standing before the post to keep the cords tight. A servant attended the executioner, and both were stout men. The servant first marked his ground, and struck the woman five times on the back. Every stroke seemed to penetrate deep into her flesh. But his master thinking him too gentle, pushed him aside, took his place, and gave all the remaining strokes himself, which were evidently more severe. The woman received twenty-five, and the man sixty: I pressed through the hussars, and counted the number as they were chalked on a board. Both seemed but just alive, especially the man, who yet had strength enough to receive a small donation with some signs of gratitude. They were conducted back to prison in a little waggon. I saw the *woman* in a very weak condition some days after, but could not find the *man* any more.

FLORENCE.

In FLORENCE are two prisons*. In the great *prison*, *Palazzo degl' Otto*, were only twenty prisoners. Six of them were in the *secrete* chambers, which are twenty-one strong rooms. None of the prisoners were in irons. They had mattresses to lie on. Their bread was good. In the torture chamber, there was a machine for decollation, which prevents that repetition of the stroke which too often happens when the axe is used.

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* Dr. *Targioni*, who had an order from his Royal Highness to inspect the hospitals, and report what beneficial improvements might be made in them, accompanied me in visiting these prisons.

ROME.

In this city, as in most parts of Italy, is a *Confraternita della misericordia*, called *S. Giovanni di Fiorentini*: as many of Florentine extraction were the founders. This institution is ancient, for the church of *S. Gio Battista Decollato* belonged to them in 1450. It consists of about seventy, chiefly nobles, of the best families. After a prisoner is condemned, one or two of them come to him the *midnight* before his execution, inform him of the sentence, and continue with him till his death. They, with the confessor, exhort and comfort him, and give him his choice of the most delicious food. All the *fraternity* attend the execution, dressed in white. When the prisoner is dead, they leave him hanging till the evening; then one of the fraternity, generally a noble, cuts him down, and orders him to be conveyed to the burying-place which they have appropriated to malefactors. I was there the twenty-ninth of August, the only day in the year when this burying-place is opened to the public. Adjoining to an elegant church is a chapel, which makes one side of a court, and on each of the other three sides, is a portico supported by doric pillars. In the middle of the pavement * of the front portico the women, and in one of the side porticos the men are buried. The latter are interred in the same dress in which they were hanged; for in Italy, coffins are not in general use.

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* Here are marble stones, in which are circular apertures for the interment of those that are executed. Round these stones is inscribed.

"*Domine, cum veneris judicare,*
"*Noli nos condemnare.*"

O Lord, when thou shalt come to judge,
do not condemn us.

GENEVA.

Here, as in the Swiss cantons, men and women are kept separate. For some years past, no capital punishment. If a criminal flies from justice, they call him in form three days: and after that execute him in effigy.

ANTWERP.

In the prison at ANTWERP there are two rooms for citizens; and up stairs there is a cage, about six feet and a half square, into which criminals are put before the torture. A criminal, while he suffers the torture, is clothed in a long shirt, has his eyes bound, and a physician and surgeon attend him: and when a confession is forced from him, and wine has been given him, he is required to sign his confession; and about forty-eight hours afterwards he is executed.

In a small dungeon is a stone seat like some I have seen in old prison towers, in which it is said that, formerly, prisoners were *suffocated by brimstone*, when their families wished to avoid the disgrace of a public execution. No person here remembers an instance of this kind; but about thirty years ago there was a *private* execution in the prison. In this prison in 1778 there were only two prisoners.—In November 1781 there were three prisoners for debt; their allowance was three halfpence a day.

BRADFORD.

Published in 1795.

This interesting tract may be divided into two parts. 1. General observations upon the punishment of death. 2. Of the American law.

1. General Observation upon the Punishment of Death.

One would think, that, in a nation jealous of its liberty, these important truths would never be over-looked; and, that the infliction of death, the highest act of power that man exercises over man, would seldom be prescribed where its necessity was doubtful. But on no subject has government, in different parts of the world, discovered more indolence and inattention than in the construction or reform of the penal code. Legislators feel themselves elevated above the commission of crimes which the laws proscribe, and they have too little personal interest in a system of punishments to be critically exact in restraining its severity. The degraded class of men, who are the victims of the laws, are thrown at a distance which obscures their sufferings, and blunts the sensibility of the legislator. Hence sanguinary punishments, contrived in despotic and barbarous ages, have been continued when the progress of freedom, science, and morals renders them unnecessary and mischievous.

It being established, that the only object of human punishments is the prevention of crimes, it necessarily follows, that when a criminal is put to death, it is not to revenge the wrongs

of society, or of any individual—"it is not to recall past time and to undo what is already done:" but merely to prevent the offender from repeating the crime, and to deter others from its commission, by the terror of the punishment. If, therefore, these two objects can be obtained by any penalty short of death, to take away life, in such a case, seems to be an authorised act of power.

That the first of these may be accomplished by perpetual imprisonment, unless the unsettled state, the weakness, or poverty, of a government prevent it, admits of little dispute. It is not only as effectual as death, but is attended with these advantages, that reparation may sometimes be made to the party injured—that punishment may follow quick upon the heels of the offence, without violating the sentiments of humanity or religion,—and if, in a course of years, the offender becomes humbled and reformed, society, instead of losing, gains a citizen.

It is more difficult to determine what effects are produced on the mind by the *terror* of capital punishments; and, whether it be absolutely necessary to deter the wicked from the commission of atrocious crimes.

Death is considered as the heaviest punishment the law can inflict. The impression it makes on the public mind is visible when a criminal is tried for his life. We see it in the general expectation—in the numbers that throng the place of trial—in the looks of the prisoner—in the anxious attention and long deliberation of the jury, and in the awful silence which prevails while the verdict is given in by their foreman. All these announce the inestimable value which is set on the life of a citizen.

But while this truth is admitted in the abstract, it cannot be denied, that the terror of death is often so weakened by the

hopes of impunity, that the less punishment seems a curb as strong as the greater. The prospect of escaping detection, and the hopes of an acquittal or pardon, blunt its operation, and defeat the expectations of the legislature. Experience proves that these hopes are wonderfully strong, and they often give birth to the most fatal rashness *. Through the violence of the temptation the offender overlooks the punishment, or sees it "in distant obscurity." Few, who contemplate the commission of a crime, deliberately count the cost.

These circumstances make it doubtful, whether capital punishments are beneficial in any cases, except in such *as exclude the hopes of pardon.* It is the universal opinion of the best writers on this subject, and many of them are among the most enlightened men of Europe, that the imagination is soon accustomed to over-look or despise the *degree* of the penalty, and that the *certainty* of it is the only effectual restraint. They contend, that capital punishments are prejudical to society from the example of barbarity they furnish, and that they multiply crimes instead of preventing them. In support of this opinion, they appeal to the experience of all ages. They affirm, it has been proved, in many instances, that the *increase* of *punishment*, though it may suddenly check, does

* Soon after the act to amend the penal laws was passed, two persons were convicted, one of robbery, the other of burglary, committed previous to it. These had the privilege of accepting the new punishment instead of the old; but they obstinately refused to pray the benefit of the act, and submitted to the sentence of death in expectation of a pardon. The hopes of one were realized; but the other was miserably disappointed. The unavailing regret he expressed when his death warrant was announced, and the horrors which seized him when he was led to execution, proved, at once, how terrible is the punishment of death, and how strong are the hopes of pardon!

not, in the end, diminish the number of offenders*. They appeal to the example of the Romans, who during the most prosperous ages of the commonwealth, punished with death none but their slaves. They appeal to the East Indians, that mild and soft people, where the gentlest punishments are said to be a curb as effectual as the most bloody code in other countries†. They appeal to the experience of Modern Europe, to the feeble operation of the increased severity against robbers and deserters in France, and to the situation of England, where, amidst a multitude of sanguinary and atrocious laws, the number of crimes is greater than in any part of Europe. They cite the example of Russia ‡, where the introduction of a *milder* system has promoted civilization, and been productive of the happiest effects: and they applaud the bolder policy of Leopold, which has actually lessened the number of crimes in Tuscany, by the *total* abolition of all capital punishments. This instructive fact is not only authenticated by discerning travel-

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* This principle is well illustrated by Montesquieu. To the facts adduced by him in support of it, the following may be added. In 1752, the British parliament passed an act for the better preventing the horrid crime of murder; by which, in order "*to add further terror to the punishment of death*," it was directed that the body of the criminal should be delivered at Surgeons Hall, to be dissected and anatomized. This expedient, it is said, carried some terror with it at first, but we are assured, that this prejudice is now pretty well worn off.—Vol. i. Wendeb. View, p. 78. This is confirmed by sir S. T. Jansen, who, on comparing the annual average of convictions for 23 years previous and subsequent to that statute, found that the number of murders had not at all decreased. *See his table in Howard's Lazar.*

† Montesq. B. 14. c. 15. There is a note in Bradford explaining this mistake as to the mildness of the Eastern laws.

‡ Beccaria. Voltaire, 4. Black. Com. p. 10.

lers, but is announced by the celebrated edict of the grand duke, issued so lately as 1786. To these might be added the example of Sweden and Denmark: and indeed the more closely we examine the effects of the different criminal codes in Europe, the more proofs we shall find to confirm this great truth, *That the source of all human corruption lies in the impunity of the criminal, not in the moderation of punishment.*

Hereafter there may be occasion further to illustrate this part of the subject: yet, even these facts incline us to suspect, that, in most cases to which it is applied, the terror of death (lessened as it is by the hopes of impunity) is neither necessary nor useful. May not milder penalties, strictly enforced, have as great an effect? Is there not sound wisdom in establishing a species of punishment in which the grade of criminality may be marked by a correspondent degree of severity? May we not be allowed to suspect, that any *apparent* necessity results rather from the indolence and inattention of governments than from the nature of things? and, may we not infer, that a legislature would be warranted to abolish this dreadful punishment in all cases (except in the *higher* degrees of treason and murder) and to make, in this country, a fair experiment in favor of the rights of human nature.

It is from the ignorance, wretchedness, or corrupted manners of a people that crimes proceed. In a country where these do not prevail, moderate punishments, strictly enforced, will be a curb as effectual as the greatest severity.

A mitigation of punishment ought, therefore, to be accompanied, as far as possible, by a *diffusion of knowledge* and a *strict execution of the laws.* The former not only contributes to enlighten, but to meliorate the manners and improve the happiness of a people.

The celebrated *Beccaria* is of opinion, that no government has a right to punish its subjects, unless it has previously

taken care to instruct them in the knowledge of the laws and the duties of public and private life. The strong mind of *William Penn* grasped at both these objects, and provisions to secure them, were interwoven with his system of punishments. The laws enjoined all parents and guardians to instruct the children under their care, so as to enable them to write and read the scriptures by the time they attained to twelve years of age: and directed, that a copy of the laws, (at that time few, simple and concise) should be used as a school book*. Similar provisions were introduced into the laws of Connecticut, and the select men are directed to see that "none suffer so much barbarism in their families as to want such learning and instruction." The children were to be "taught the laws against capital offences †," as those at Rome were accustomed to commit the twelve tables to memory. These were regulations in the pure spirit of a republic, which, considering the youth as the property of the state, does not permit a parent to bring up his children in ignorance and vice.

The policy of the Eastern states, in the establishment of public schools, aided by the convenient size and *incorporation* of their townships, deserves attention and imitation. It is, doubtless, in a great measure, owing to the diffusion of knowledge which these produce, that executions have been so rare in New England; and, for the same reason, they are comparatively few in Scotland ‡. Early education prevents more crimes than the severity of the criminal code.

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* Laws, 1682. c. lx. 112. † Laws, Conn. p. 20.

‡ Scotland is nearly twice as populous as London; yet, by the tables referred to already, it appears, that about *thirty* criminals are executed, yearly, in London, while not quite *four* is the yearly average in Scotland. The difference between those *capitally convicted*, in two places, is much greater.—*How. p.* 9, 483-5.

The constitution of Pennsylvania contemplates this great object and directs, that "Schools shall be established, by law, throughout this state." Although there are real difficulties which oppose themselves to the *perfect* execution of the plan, yet, the advantages of it are so manifest that an enlightened legislator will, no doubt, cheerfully encounter, and, in the end, be able to surmount them.

Secondly—Laws which prescribe hard labour as a punishment should be strictly executed. The criminals ought, as far as possible, to be collected in one place, easily accessible to those who have the inspection of it. When they are together their management will be less expensive, more systematic and beneficial. Their treatment ought to be such as to make their confinement an *actual* punishment, and the remembrance of it a terror in future. The labour, in most cases, should be real *hard* labour; the food, though wholesome, should be *coarse*; the confinement sufficiently *long* to break down a disposition to vice; and the salutary rigour of *perfect solitude*, *invariably* inflicted on the greater offenders. Escapes should be industriously guarded against, pardons should be rarely, *very rarely* granted, and the punishment of those who are guilty of a second offence should be sufficiently severe.

The reformation of offenders is declared to be one of the objects of the legislature in reducing the punishment; but time, and in some cases, *much time*, must be allowed for this. It is easy to counterfeit contrition; but it is impossible to have faith in the sudden conversion of an old offender.

On these hints I mean not to enlarge, but they point to objects of great importance, which may deserve attention whenever a further reform is attempted.

The conclusion to which we are led by this enquiry seems to be, that in all cases (except those of high treason and murder) the punishment of death may be safely abolished, and milder penalties advantageously introduced. Such a system of punishments, aided and enforced in a manner I have mentioned, will not only have an auspicious influence on the character, morals, and happiness of the people, but may hasten the period, when, in the progress of civilization, the punishment of death shall cease to be necessary; and the legislature of Pennsylvania, putting the key-stone to the arch, may triumph in the *completion* of their benevolent work.

THE LAWS OF AMERICA.

These laws are considered, 1. in general, 2. in Pennsylvania.

1. General Observations upon the Penal Laws of America.

That these punishments ought to be greatly lessened, if not totally abolished, is the opinion of many of the most enlightened men in America: among these I may be allowed to mention the respectable names of Mr. Jefferson, Mr. Wythe and Mr. Pendleton of Virginia, who, as a committee of revision, in their report to the general assembly of that state, recommended the abolition of capital punishments in all cases but those of treason and murder: a proposal, which, unfortunately for the interests of humanity, was rejected in the legislature by a single vote.

But authorities may mislead, and theory may be delusive. Government is an experimental science; and a series of well established facts in our state is the best source of rational induction for us.

Happily for Pennsylvania the examination and reform of the penal laws have been considered by the legislature as one of its most important duties. Much attention has been paid to this subject since the revolution. Capital punishments have, in several instances, been abolished; and in others, the penalty has been better proportioned to the offence. This has been considered as the commencement of a more general reform; and, if the result of the experiment shall be found to be such as the friends of humanity wish, it has been generally expected, that the legislature would resume the benevolent task. Proceeding with that caution, which innovation on an ancient system demands, they have paused in their labours, but it is hoped they have not abandoned the work.

What success has attended the new system of punishments, is therefore, a question interesting to humanity. Some years have elapsed since its first establishment, and we now have data sufficient to calculate its effects.

Few of the American constitutions are sufficiently express, though they are not silent, on this subject. That of New Hampshire declares, "that all penalties should be proportioned to the nature of the offence, and that a multitude of sanguinary punishments is impolitic and unjust, the true design of all punishments being to reform, and not to exterminate mankind." The constitution of Vermont enjoins the introduction of hard labour as a punishment, in order to lessen the necessity for such as are capital: and that of Pennsylvania framed in 1776, directed the future legislature "to reform the penal laws—to make punishments less sanguinary, and, in some cases, more proportioned to the offences." But it was in Maryland alone that the *general* principle was asserted; and, in the enumeration of their rights, we find it declared, "that sanguinary punishments ought to be avoided, as far as is consistent with the safety of the state." The other

constitutions which touch on this subject content themselves with generally declaring, "that cruel punishments ought not to be inflicted." But does not this involve the same principle, and implicitly prohibit every penalty which is not evident ?

The experience of America does not contradict that of Europe. Crimes, which are capital in one state, are punished more mildly in another; and, in the same state, offences which were formerly capital are not so at present. Such are those of horse-stealing, forgery, counterfeiting bills of credit or the coin, robbery, burglary, and some others: but I cannot learn that these crimes have been better repressed by the punishment of death than by a milder penalty. Horse-stealing has always been treated like the other kinds of simple larceny in New England and in Pennsylvania: in all the states southward of Maryland, it is a capital crime. In the latter states the offence seems to be as common as in the former; and if the severity of the punishment has any beneficial effect, my enquiries have not been able to ascertain it. On the contrary, I have the best authority for saying, that, in Virginia, the effect is so feeble, that of all crimes this is the most frequent. New Jersey has made the experiment fairly. At first it was a felony of death; in 1769 the law was repealed: it was again revived in 1780; but after a few years experience, the legislature was obliged to listen once more to the voice of humanity and sound policy. The unwillingness of witnesses to prosecute, the facility with which juries acquitted, and the prospects of pardon, created hopes of impunity which invited and multiplied the offence *.

* Horse-stealing is a crime which naturally irritates a nation of farmers: and when they are provoked by its frequency, they are apt to call for a punishment neither proportioned to the offence, nor calculated to prevent it.

In the case of forgery the balance is clearly on the side of the milder punishment. It is capital in New York, but it is not so in Pennsylvania; and, in the latter state, there have been fewer convicted of this crime than in the former. It is natural that it should be so; for the public sentiment revolting against this severity, very few have been executed: and the mischief became so apparent, that the late attorney general thought it his duty to present a memorial to the assembly, and to recommend a milder punishment than death.

Another fact deserves notice. Bank bills have been several times forged in the state of New York: but in Pennsylvania this crime has never been committed, although the act which made it capital at first, was repealed above seven years ago.

This crime became so prevalent in Pennsylvania, during the confusions of the war, which interrupted the regular administration of justice, that the assembly thought it necessary to increase the punishment of it. They would have extended the penalty to death itself, had not the late Judge Bryan, at that time a member of the legislature (who to a sound understanding added a familiar acquaintance with all the philosophy of jurisprudence) strenuously opposed it. He made it evident to the good sense of the country members, who were intent upon this punishment, that the severity of the act would defeat its execution, and that a milder penalty would be a more effectual restraint. The subsequent experience of Pennsylvania compared with that of New Jersy (where in the same year the penalty of death was resorted to) fully proves the soundness of this opinion.

I know not any government in Europe which punishes this offence with death, in the present day, except that of England; and even there, the humanity of the nation has almost virtually abolished it. Of ninety persons, who in the space of 23 years were convicted at the Old Bailey, previous to 1771, there were but 22

Counterfeiting the continental bills of credit and uttering them knowingly, were, as far as I can learn, much more frequent in this state, where they were capital, than in Connecticut where they were not. It appears, by the annexed table, that, in the space of two years, while such bills were current, there were eighteen persons tried for these crimes, of whom eleven were convicted. This is nearly equal to all the other instances of forgery, not capital, that have occurred in the long term of fourteen years. Robbery, burglary, and the crime against nature were formerly punished with death in this state: since the year 1786, they have been as effectually restrained by the gentler penalties of imprisonment and hard labour.

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executed, which is less than a fourth.—*See Jansen's Tables.* The multitude who escape for want of prosecution, or by the tenderness of juries, is much greater; and it is now so common to grant a reprieve, that a well informed writer affirms, that the chance of obtaining it is, as *one to forty in favour of the thief!* Thoughts on Ex. Just. p. 42. One reason of this may be, that many persons consider it as unlawful to inflict the punishment of death, in any case of simple theft, since it is warranted by no part of the law given to the Jews.

A similar difficulty in enforcing a punishment so disproportionate to the offence, has been experienced in some parts of America: and it will every day become more and more apparent in those states, which still retain this unnecessary severity. I have very respectable authority (that of the attorney general of the United States) for saying, "that within the last ten years, *pardons* for horse-stealing have multiplied in Virginia: and while the convicts might by law be put to hard labour, or executed at the will of the executive, scarce a single horse-stealer suffered death, unless he had repeated the crime, or was under some very obnoxious circumstances."

The experience of Maryland, and, also, of Connecticut, where a similar system has been adopted with regard to the two first of these crimes, is said to establish the same fact.

2. Of the Penal Laws of Pennsylvania.

Historical View of the Criminal Law of Pennsylvania.

The royal charter to William Penn directs, that the laws of Pennsylvania "respecting felonies, should be the same with those of England, until altered by the acts of the future legislature," who are enjoined to make these acts "as near, as conveniently may be, to those of England.

But the founder of the province was a philosopher whose elevated mind rose above the errors and prejudices of his age. He saw the wickedness of exterminating where it was possible to reform: and the folly of capital punishments in a country where he hoped to establish purity of morals, and innocence of manners. Among the first cares of his administration, was that of forming a small, concise, but complete code of criminal law, fitted to the state of his new settlement: a code which is animated by the pure spirit of philanthropy, and, where we may discover those principles of penal law, the elucidation of which has given so much celebrity to the philosophy of modern times. The punishments prescribed in it were calculated to tie up the hands of the criminal, to reform, to repair the wrongs of the injured party, and to hold up an object of terror sufficient to check a people whose manners he endeavoured to fashion by provisions interwoven in the same system. Robbery, burglary, arson, rape, the crime against nature, forgery, levying war against the governor, conspiring his death, and other crimes, deemed so heinous

in many countries, and for which so many thousands have been executed in Britain, were declared to be no longer capital. Different degrees of imprisonment at hard labour, stripes, fines and forfeitures, were the whole compass of punishment inflicted on these offences. Murder, "wilful and premeditated," is the only crime for which the infliction of death is prescribed.

These laws were at first temporary, but being at length, permanently enacted, they were transmitted to England, and were all, without exception, repealed by the queen in council. The rights of humanity, however, were not tamely given up: the same laws were immediately re-enacted, and they continued until the year 1718, and might have remained to this day had not high-handed measures driven our ancestors into an adoption of the sanguinary statutes of the mother country. During this long space of thirty-five years, it does not appear that the mildness of the laws invited offences, or that Pennsylvania was the theatre of more atrocious crimes than the other colonies. The judical records of that day are lost: but, upon those of the legislative or executive departments and other public papers, no complaint of their inefficacy can be found; or any attempt to punish these crimes with death. On the contrary, as these laws were temporary, the subject was often before the legislature, and they were often re-enacted: which is a decisive proof that they were found adequate to their object.

We perceive by this detail, that the severity of our criminal law is an exotic plant, and not the native growth of Pennsylvania. It has been endured, but, I believe, has never been a favourite. The religious opinions of many of our citizens were in opposition to it: and, as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them. During our connection with

Great Britain no reform was attempted : but, as soon as we separated from her, the public sentiment disclosed itself, and this benevolent undertaking was enjoined by the constitution.

In obedience to these injunctions, the assembly proceeded, in the year 1786, to introduce the punishment of hard labour : and the offences (formerly capital) on which its effects have been tried, are, the crime against nature, robbery and burglary.

We are now to enquire whether this punishment has been less efficacious in preventing these crimes than the punishment of death. To aid this enquiry, a table exhibiting a view of the number of persons convicted, acquitted and executed, since the year 1778, is annexed.

A Table exhibiting a View of the number of Persons convicted of all capital and certain other crimes in Pennsylvania.

Yrs.	Crime against Nature.			Robbery.				Burglary.				*Counterfeiting* the Coin.			Rape.			Arson.			Murder.				Manslaughter		Treason.			*Counterfeiting* bills of credit.		
	Acquitted,	Convicted,	Executed,	Acquitted,	Acquitted of robbery, but guilty of larceny.	Convicted,	Executed,	Acquitted,	Acquitted of burglary, but guilty of larceny.	Convicted,	Executed,	Acquitted,	Convicted,	Executed,	Acquitted,	Convicted,	Executed,	Acquitted,	Convicted,	Executed,	Acquitted,	Acquitted of murder, but guilty of manslaughter.	Convicted,	Executed.	Acquitted,	Convicted,	Acquitted,	Convicted,	Executed,	Acquitted,	Convicted,	Executed,
1779						5	4	1		3	2				1						6	1	5	4				1	1	3	5	3
1780				6		3	3	2	2	6	5				1			2	1		4		2	2			1	2	1	4	6	2
1781				3		3	3	7		10	4				2	1	1	2			1	2			1	1				3		
1782				4		15	3	3		8	4										1	2	2	2			2			1		
1783		1		1		2	2	3	2	5					1	1		2	3		3	5	4		1							
1784				4		7	5	4		8	8				1						2	1			2							
1785		1	1	2				2	3	4	2				1	1	1				1	5			1					1		
1786								1	2	10						3	1		1		4			5	3							
						7		3		4																						
1787				1		6		5		7													3	2	1							
1788		1		2		7		3		14	1	1	1	1	1	1					3				1							
1789				1	1	22	1	2		5								2			3		6	6								
1790				1		11				5		1			1			2			2	2	3			2						
1791						2				6															1	1						
1792				1		3				5						2	2	1			1	1	2	1	1	1						
Tot.	3	3	1	26	1	93	21	37	9	100	26	2	1	1	9	9	5	7	5	1	38	11	34	26	12	5	4	4	2	12	11	5

I. The Table states the number of *Offenders*, not of *Convictions*; therefore, where a person appears to have been twice convicted of the same crime, at the same sessions, no notice is taken of it in the table.

II. In the convictions of 1782, several attainers, by outlawry, are included; the robberies committed being matter of public notoriety.

III. The dotted line separates those offences of the year 1786, which were previous to the act to amend the penal laws, from those which were subsequent to it.

Of the Crime against Nature.

This crime, to which there is so little temptation, that philosophers have affected to doubt its existence, is, in America, as rare as it is detestable. In a country where marriages take place so early, and the intercourse between the sexes is not difficult, there can be no reason for severe penalties to restrain this abuse. The experiment that has been made, proves that the mildness of the punishment has not increased the offence. *In the six years preceding the act, and while the crime was capital, there are on record two instances of it: in the same period since, there is but one.* It was impossible this last offender could be seduced by the mildness of the punishment, because at the time, and long after his arrest, he believed it to be a capital crime.

Robbery and Burglary.

The salutary effects of this change in our laws are not so evident in the cases of robbery and burglary as in that of the crime against nature. On the contrary, a superficial inspection of the annexed table would lead a careless observer to believe that it has tended to encourage these crimes instead of suppressing them. It is true, there were, at first, great defects in the plan, and still greater in the execution: and, for some time after its adoption, it had difficulties to struggle with which nothing but the native merit of its principle could have surmounted. A detail of these is necessary to enable us justly to appreciate this new system of punishment.

It must be remarked, that about three-fourths of the convictions of robbery and burglary, stated in the table, took place in Philadelphia. In a large city like this there is always a class of men, sometimes greater and sometimes less, who live by dishonest means, and considering theft as a regular voca-

:ion, pass through all the gradations of simple larceny into he higher departments of robbery and burglary. It so happened, that about the time of passing the act for amending he penal laws, there was accumulated in the gaol of the city and country of Philadelphia a great number of persons who had been convicted of these and other infamous crimes, and were either pardoned by the mercy of the government, or had undergone the punishment (and some of them the *repeated* punishment) of the pillory and whipping-post. These wretches, hardened by the nature of the punishment they had sustained, shut up together in idleness, freely supplied with liquor, witnesses of each others debauchery, instructing the inexperienced in the arts of villainy, and mutually corrupting and corrupted by each other, were a melancholy proof of the inefficacy of our former laws, and they were well prepared to despise the new. In order to clear the gaol, and accommodate it to the operation of the new system, these offenders were, from time to time, discharged, and as soon as they were at liberty they returned to their old vocation.

It is a fact well known, that among all the convicts which first fell under the correction of the new law, scarce a new face appeared. Most of those who were convicted of the two offences in question, were sentenced to undergo an imprisonment of five, seven, or ten years; and had these sentences been strictly enforced, the benefit of the new system would have been apparent, and these crimes would have become rare.

Of all offenders these are the most incorrigible. Other offences are seldom repeated: but a person once devoted to any species of theft is seldom reclaimed by any terrors he has undergone or any mercy he has received. Reformation, though not impossible, must be the work of much time. A *strict execution* of the act was, therefore, essential to its success. But it unfortunately happened, that they were scarcely

convicted before many of them were again loose upon the public. Pardons, so destructive to every mild system of penal laws, instead of being thought *dangerous*, were granted with a profusion as unaccountable as it was mischievous: and escapes, which ought to have been guarded against by the most vigilant care, were multiplied to an alarming degree. Sixty-eight different persons were convicted of these offences previous to the year 1790. Of these, twenty-nine escaped, and thirty have been pardoned, five executed for capital offences committed after their escape, and one killed in an affray. I doubt whether any one male offender served out the time to which he was condemned by the sentence of the court; and it is certain, that there is not, at this time, in gaol, a single person *under* a sentence pronounced previous to the year 1791. When to these abuses it is added, that the system itself was defective in requiring the criminals to be employed abroad, which gave them opportunities for intoxication, and hardened them against shame; that their labour was not equal to that which it is the lot of poverty to endure, while their fare was much better; that there were no places for solitary confinement nor power to inflict it, and no real increase of punishment for a second offence; we may readily conjecture, that the operations of the system must have been not only impeded but perverted.

The defects of the system were corrected in 1790; the execution of it has been diligently attended to by the inspectors, and the prerogative of pardon, since it has resided in a single magistrate, is no longer weakly exercised.

Our calculations ought, therefore, to be made on the operations of the corrected system *during the two last years.* From an inspection of the table, it is evident these crimes have greatly decreased during that period. *The convictions in those two years are, upon an average, considerably less than those in any two years which precede them.*

But, under all the difficulties which, at first, it encountered, and without allowing for re-convictions which swell the account, let us examine what has been the general effect of the system, on these crimes, since it was first adopted. Referring, therefore, to the table, and excluding the year 1778, in order to make the time previous and subsequent to the act as equal as we can, the account will stand thus:

	Before the act.	*Since* the act.
Convicted,	81	104
Convicted partially,	9	10
Acquitted,	42	20
Total tried,	132	134

From this statement it appears, *that more persons were tried for these offences, while they were capital, than since the punishment has been lessened: and if we allow for re-convictions, the difference will be much greater.* It is true, the number of persons convicted in the former period, is less than that of those convicted in the latter: but in this (as well as in the number of partial acquittals) I see nothing but the humane struggles of the jury to save the offender from death. At that period the acquittals were more than *half* the number of the convictions: since the change in our laws, they do not amount to a *fourth*.—A proof how much the severity of a law tends to defeat its execution*!

* THE FOLLOWING CASE IS FROM DALLAS'S AMERICAN REPORTS.

The Commonwealth, v. *Dillon*.

4 DALLAS, 116.

The prisoner (a boy about 12 years old) was indicted for arson, in burning several stables, containing hay, &c. He was examined before the mayor of the city of Philadelphia on the 20th of December, 1791, and then confessed the commission of the offences, with

It is probable that the number of *these* crimes would have been less, had a greater difference been made between *their* punishment and that of simple larceny. Perhaps it might have a beneficial effect, if solitary confinement and coarse fare were a *necessary* part of the punishment. At present, it forms no part of the sentence on the criminal, but is inflicted at the discretion of the inspectors, on "the more hardened offenders. This is so indefinite a description, that this salutary rigour may be either capriciously inflicted or weakly withheld: and, as it is not the *certain* consequence of the offence, it can be no check upon the mind of the offender.

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which he was charged; but, as his own confession was the principal evidence (indeed there was no other possitive evidence) against him, his counsel insisted that it was obtained under such duresse, accompanied with threats and promises, as destroyed its legal credit and validity. The evidence on that point was, substantially, as follows:

On the 18th of December, the prisoner was committed to the jail of Philadelphia, and the next day was taken before the mayor; but, at that time he made no confession. On the 18th and 19th of December he was visited and interrogated by several respectable citizens, who represented to him the enormity of the crime, urged a free, open, and candid confession, which would so excite public compaision as, probably, to be the means of obtaining a pardon; while a contrary course of conduct would leave him, in case of a conviction, without hope: and they added, that they would themselves stand his friends, if he would confess. The inspectors of the prison endeavoured, likewise, to obtain from him a discovery of his offences, and of his accomplices. They carried him into the dungeon; they displayed it in all its gloom and horror; they said that he would be confined in it, dark, cold, and hungry, unless he made a full disclosure; but if he did make a disclosure, he should be well accommodated with room, fire, and victuals, and might expect pity and favour. The prisoner continued to deny his

It might be sound policy to make a distinction between the punishment of those who commit these offences, armed with dangerous and mortal weapons, and of those who do not indicate such violent intentions. Such a distinction prevails in the laws of Connecticut, and also in those of Milan: and I understood from the nephew of the Marquis Beccaria, while he was in America, that beneficial effects had resulted from this discrimination.

These crimes are still punished with death in the first instance, when committed by any person, sentenced to hard

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guilt for some time; and when his master visited him, he complained of the want of clothes, fire, and nourishment. At length, however, on the 19th of December, he made successive acknowledgments of the facts contained in his confession, which was formally, and to all appearance, voluntarily, made before the mayor on the succeeding morning, and which was repeated with additional circumstances, at subsequent periods.

In the prisoner's defence various authorities were cited, principally to guard the jury against the danger of mere presumptive evidence, and an extorted confession of guilt, through force, hope, or fear, particularly in the case of an infant.

For the Commonwealth.—The confession was delivered before the mayor, and afterwards repeated and enlarged, without the least appearance of constraint or terror. No public officer has improperly attempted to excite fear, or hope, as the medium of extorting a discovery; and all that was said, or done, in that respect, proceeded from the avowed friends of the prisoner, and the known promoters of humanity. Besides, the confession itself bears intrinsic marks of sincerity and truth; and neither the wildness of the boys motive, for committing the crimes, nor his youth, can afford a satisfactory answer to the charge. *Fost.* 70. And after all, to destroy the legal effect of the confession as evidence, it must be proved, 1st, that previous improper means were employed; and

labour, after an escape; and, also, on the second conviction, if the offender was pardoned for the first. A similar provision is found in the laws of Denmark, where robbery is not in the first instance a capital offence, and where (Mr. Howard assures us) night robberies are never heard of *.

It is evident from this examination, that the principle of the new system, properly modified, coincides with the public safety as much as with the dictates of humanity. The happy result of this experiment is an encouragement to proceed still further. I have already observed, that no offenders

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2dly, that the confession was the immediate consequence of these improper means.

By the Court.—The fact of the arson is established; and it only remains to decide, whether it was committed by the prisoner? The proof against him, depends upon his own confession, slightly corroborated by the testimony of two witnesses. The confession was freely and voluntarily made, was fairly and openly received, before the mayor; and, therefore, it was regularly read in evidence. But still, it has been urged, that it was thus apparently well made before the mayor, in consequence of improper measures previously pursued by the boy. The interference of the inspectors of the prison was certainly irregular; though the public anxiety, in which they participated, upon this extraordinary occasion, may be admitted as an excuse. The manner in which he was urged, though not threatened, by the citizens who visited him, may likewise be objectionable. But is it reasonable to infer, that all the prisoner's confessions were falsely made under the influence of those occurrences? Consider the nature of the offence. It cannot be openly perpetrated; for, it would be instantly prevented; and if it is secretly perpetrated, how, generally speaking, can the offender be detected, but by his own declarations? If such declarations are

* Howard on Prisons, p. 76.—Williams on the North. Gov. v. i. p. 353.

are so incorrigible as robbers and burglars; and on few crimes could the experiment have been made with so little prospect of success as on these I have been considering. Succeeding in this, there is little to apprehend from extending it to other crimes, which, though still capital, are not of the deepest dye.

Counterfeiting the Coin.

The monstrous folly of considering this offence as an usurpation of sovereignty, and therefore a species of high treason, is past: and it may now be safely ranked with other base

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voluntarily made, all the world will agree, that they furnish the strongest evidence of imputed guilt. The hope of mercy actuates almost every criminal, who confesses his crime; and merely that he cherishes the hope, is no reason, in morality, nor in law, to disbelieve him. The true point for consideration therefore is, whether the prisoner has falsely declared himself guilty of a capital offence? If there is ground even to suspect, that he has done so, God forbid, that his life should be the sacrifice! while, therefore, on the one hand, it is remarked, that all the stables set on fire, were in the neighbourhood of his master's house; that he has, in part, communicated the facts to another boy; that his conduct had excited the suspicion of a girl who knew him; and that he expressed no wish to retract the statement, which he had given: the jury will, on the other hand, remember, that if any entertain a doubt upon the subject, it is their duty to pronounce an acquittal. Though it is their province to administer justice, and not to bestow mercy; and though it is better not to err at all; yet, in a doubtful case, an error on the side of mercy is safer, is more venial, than error on the side of rigid justice.——*Verdict, Not Guilty.*

The humanity of the jury being gratified by an acquittal of the prisoner from the capital charge: he was indicted and convicted on the same facts, for a misdemeanor. By the reform of our penal code, arson is no longer a capital crime.

frauds against individuals. The edict of the Duke of Tuscany considers the coining of false money as grand larceny, and punishes it as such. This crime is not capital in Massachusetts, nor in Connecticut, nor in Maryland, nor in North Carolina, as far as relates to foreign coin; and to every reflecting mind, which is not still enslaved by ancient errors, the punishment of death must appear to be far beyond the demerits of the offence. Is it wise, or is it just, to confound together dissimilar crimes, and to involve him who debases a piece of money, in the same punishment with him who is guilty of deliberate murder?

There is no substantial reason for making this crime capital which does not equally apply to that of forgery. In the present state of society paper negotiations require as much protection as the coin. The latter offence, in general, is more easily committed; and a single act of forgery may be more injurious to the individual than many acts of counterfeiting the coin. Yet, we find, the paper of the banks, promissory notes, and bills of exchange, sufficiently safe under the mild system of our laws. It is true, various acts of assembly made it a felony of death to counterfeit and utter the continental bills of credit: but it has been already stated, that no beneficial consequences resulted from this severity.

RAPE.

William Penn considered imprisonment, stripes and hard labour as a punishment adequate to this crime, and sufficient to check the commission of it. The grand Duke of Tuscany prescribes imprisonment at labour, varied as the circumstances may require. The legislature of Vermont, so late as the year 1791, has followed the humane example, and in that state, death is no longer inflicted on this offence.

If any one, mistaking the end of punishment, and more intent on vengeance than the prevention of the crime, deems this chastisement too light, a visit to the penitentiary house lately erected as part of the gaol of Philadelphia, will correct the opinion. When he looks into the narrow cells prepared for the more atrocious offenders—When he realizes what it is to subsist on coarse fare; to languish in the solitude of a prison; to wear out his tedious days and long nights in feverish anxiety; to be cut off from his family, from his friends, from society, from all that makes life dear to the heart; when he realizes this, he will no longer think the punishment inadequate to the offence.

Arson.

This offence may be committed so secretly, that it is seldom possible to collect proof sufficient on a charge that is capital. Other crimes are committed in the presence of witnesses, or are attended with circumstances which point out the criminal: but in arson there are no eye witnesses; the presumptive proof will seldom be *violent*, and confessions are only to be expected from the ignorance of slaves and children. These confessions (too generally extorted by promises or threats) come before the jury in so questionable a shape, that they are often disregarded.

Hence the severity of the punishment, in this case, leads in a peculiar manner to impunity. The proof is so difficult that juries are justified in acquitting, and the objects convicted are such as the executive is prompt to pardon. Of five persons convicted of this crime only one was executed.—This was a *negro* woman in a *distant* county.

The crime of arson extends only to the wilful burning of a dwelling-house, certain public buildings, or a barn having hay or corn therein. Every other species of property may be

maliciously destroyed by fire, without incurring the forfeiture of life. Hence, ships and other vessels in harbour or on the stocks, hay and grain in stack or barrack, magazines of arms and provisions, store-houses of every description, mills, theatres, and distilleries, are not protected by these high terrors of the law: and to burn *them* is considered merely as a misdemeanor at common law. Here then is a fair opportunity for comparison. Has the milder punishment encouraged these malicious crimes; or, has the terror of death, hung up on high, deterred offenders from the crime of arson? The following fact will answer the question. *Since the revolution twelve persons have been indicted for the crime of arson; and only two for any other species of malicious burning!*

In New Hampshire and Massachusetts this crime is not capital if committed in the day time: nor in Connecticut, "if no prejudice or hazard to the life of any person happen therefrom." To burn public vessels or magazines of provision, *in time of war*, being a species of treason, is indeed capital in that state: but it is not so if the same offence be committed in time of peace. I cannot learn that these distinctions have any effect, or that the less offence is more frequent than the greater.

Upon the whole, it seems that solitude and hard labour will be a punishment for this crime, as efficacious and more advantageous to the public, than death. The offender may be reformed and become a useful citizen, and he may be compelled to repair, by his estate or his labour, the injury he has done. This was formerly required in most cases, by the laws of William Penn; but, at present, is swallowed up by the legal maxim, which merges the private in the public wrong: a maxim, invented by fiscal or feudal ingenuity, to prevent the claims of the injured party from interfering with the forfeiture to the crown and the escheat to the lord.

MURDER.

Murder, in its highest degree, has generally been punished with death, and it is for deliberate assassination, if in any case, that this punishment will be justifiable and useful. Existence is the first blessing of Heaven, because all others depend upon it. Its protection is the great object of civil society, and governments are bound to adopt every measure which is in any degree essential to its preservation. The life of the deliberate assassin can be of little worth to society, and it were better that ten such atrocious criminals should suffer the penalty of the present system, than that one worthy citizen should perish by its abolition. The crime imports extreme depravity, and admits of no reparation.

"But why should capital punishments have a more powerful effect on these than on other offenders?" I have already observed, that the fear of death is universal and impressive: and that its beneficial effects are defeated principally by the hopes of impunity.

We have had no experience what its effect will be when it is applied to a *single* crime of such a nature as to exclude the hopes of pardon. In such a case, where an execution would be as rare as it is dreadful, the wholesome terror of the law would be wonderfully increased: and this is one reason why a less punishment should be adopted for other crimes.

If we seek a punishment capable of impressing a strong and lasting terror, we shall find it in an execution *rarely* occurring, *solemnly* conducted, and inflicted in a case, where the feelings of mankind *acquiesce in its justice* and do not revolt at its severity.

But while I contend that this is the most powerful curb of human governments, I do not affirm that it is *absolutely* necessary, or that a milder one would be insufficient. It is possible that the further diffusion of knowledge and melioration of manners, may render capital punishments unnecessary in all cases: but, until we have had more experience, it is safest to tread with caution on such delicate ground, and to proceed step by step in so great a work. A few years experience is often of more real use than all the theory and rhetoric in the world. One thing, however, is clear. Whatever be the punishment inflicted on the higher degrees of murder, it ought to be *widely* different from that of every other crime. If not different in its *nature*, at least let there be some circumstance in it, calculated to strike the imagination, to impress a respect for life, and to remove the temptation which the villain otherwise has, to prevent the discovery of a less crime by the commission of a greater.

AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY. READ IN THE SOCIETY FOR PROMOTING POLITICAL ENQUIRIES, CONVENED AT THE HOUSE OF BENJAMIN FRANKLIN, ESQ. IN PHILADELPHIA, MARCH 9th, 1787.

PUBLISHED IN THE YEAR 1787.

THE design of punishment is said to be, 1st, to reform the person who suffers it: 2dly, to prevent the perpetration of crimes, by exciting terror in the minds of spectators: and, 3dly, to remove those persons from society, who have manifested, by their tempers and crimes, that they are unfit to live in it.

I. The reformation of a criminal can never be effected by a public punishment, for the following reasons.

1st. As it is always connected with infamy, it destroys in him the sense of shame, which is one of the strongest out-posts of virtue.

2dly. It is generally of such short duration, as to produce none of those changes in body or mind, which are absolutely necessary to reform obstinate habits of vice.

3dly. Experience proves, that public punishments have increased propensities to crimes. A man who has lost his character at a whipping-post, has nothing valuable left to lose

in society. Pain has begotten insensibility to the whip; and infamy to shame. Added to his old habits of vice, he probably feels a spirit of revenge against the whole community, whose laws have inflicted his punishment upon him; and hence he is stimulated to add to the number and enormity of his outrages upon society. The long duration of the punishment, when public, by increasing its infamy, serves only to increase the evils that have been mentioned. The criminals, who were sentenced to work in the presence of the City of London, upon the Thames, during the late war, were prepared by it, for the perpetration of every crime, as soon as they were set at liberty from their confinement. I proceed,

II. To shew, that public punishments, so far from preventing crimes by the terror they excite in the minds of spectators, are directly calculated to produce them.

All men, when they suffer, discover either *fortitude*, *insensibility*, or *distress*. Let us inquire into the effects of each of these upon the minds of spectators.

1st. *Fortitude* is a virtue*, that seizes so forcibly upon our esteem, that wherever we see it, it never fails to weaken, or

* At the beginning of this month were executed, at Heavetree-Gallows, Exeter, William Snow, for house-breaking, and James Waybourn, for highway-robbery. Snow declared that day to be the happiest of his life; and exhorted the spectators to avoid his errors. He had hung but a few seconds, when the rope slipped from the gallows, and he fell to the ground. It is impossible to describe the feelings of the multitude at the thought of his being again suspended; yet was this painful interval less afflicting to the patient sufferer than to the spectators. Snow heard their sorrowful exclamations, and said, with an air of compassion, "Good people, be not hurried; I am not hurried;

to obliterate, our detestation of the crimes with which it is connected in criminals. "I call upon you," said major Andre, at the place of execution to his attendants, "to bear witness, gentlemen, that "I die like a brave man." The effect of this speech upon the American army is well known. The spy was lost in the hero: and indignation, every where, gave way to admiration and praise.

2dly. If criminals discover *insensibility* under their punishments, the effect of it must be still more fatal upon society. It removes, instead of exciting terror. In some instances, I conceive it may excite a desire in the minds of persons whom debt or secret guilt has made miserable, to seek an end of their distresses in the same enviable apathy to evil†. Should this insensibility be connected with chearfulness, which is sometimes the case, it must produce still more unfriendly effects upon society. But terrible must be the consequence of this insensibility and chearfulness, if they should lead criminals to retaliate upon the inhuman curiosity of spectators, by profane or indecent insults or conversation.

3dly. The effects of *distress* in criminals, though less obvious are not less injurious to society, than fortitude or insen-

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I can wait a little." And, the executioner wishing to lengthen the rope, Snow calmly waited till his companion was dead, when the rope was taken from the deceased's arms, in order to complete the execution of Snow; who was a second time launched from the cart, amidst the tears of thousands.—*Historical Magazine, Feb.* 1789.

† His Majesty having granted a pardon to the female convicts in Newgate, whose sentences have been respited, on condition of being transported to the coast of New South Wales, seventeen of them, with becoming submission, accepted the royal favour; but the other *six* obstinately chose death, rather than a removal from their connections.—*Historical Magazine, Feb.* 1789.

Laws can only be respected and obeyed, while they bear an exact proportion to crimes.—The law which punishes the shooting of a swan with death, in England, has produced a thousand murders. Nor is this all the mischievous influence, which the punishment of ignominy has upon society. While murder is punished with death, the man who robs on the high-way, or breaks open a house, must want the common feelings and principles which belong to human nature, if he does not add murder to theft, in order to screen himself, if he should be detected, from that punishment which is acknowledged to be more terrible than death.

It would seem strange, that ignominy should ever have been adopted, as a milder punishment than death, did we not know that the human mind seldom arrives at truth upon any subject, till it has first reached the extremity of error.

8thly. But may not the benefit derived to society, by employing criminals to repair public roads, or to clean streets, over balance the evils that have been mentioned? I answer, by no means. On the contrary, besides operating in one, or in all the ways that have been described, the practice of employing criminals in public labour, will render labour of every kind disreputable; more especially that species of it, which has for its objects the convenience or improvement of the state. It is a well-known fact, that white men soon decline labour in the West Indies, and in the southern states, only because the agriculture, and mechanical employments of those countries, are carried on chiefly by negro slaves. But I object further to the employment of criminals on the high-ways and streets, from the idleness it will create, by alluring spectators from their business, and thereby depriving the state of greater benefits from the industry of its citizens, than it can ever derive from the labour of criminals.

The history of public punishments, in every age and country, is full of facts, which support every principle that has been advanced. What has been the operation of the seventy thousand executions, that have taken place in Great Britain from the year 1688, to the present day, upon the morals and manners of the inhabitants of that island? Has not every prison-door that has been opened, to conduct criminals to public shame and punishment, unlocked, at the same time, the bars of moral obligation upon the minds of ten times the number of people? How often do we find pockets picked under a gallows, and highway robberies committed in sight of a gibbet? From whence arose the conspiracies, with assassinations and poisonings, which prevailed in the decline of the Roman Empire? Were they not favoured by the public executions of the amphitheatre? It is therefore to the combined operation of indolence, prejudice, ignorance, and the defect of culture of the human heart, alone, that we are to ascribe the continuance of public punishments, after such long and multiplied experience of their inefficacy to reform bad men, or to prevent the commission of crimes.

If punishments were moderate, just, and private, they would exalt the feelings of public justice and benevolence so far above the emotions of humanity in witnesses, juries and judges, that they would forget to conceal, or to palliate crimes: and the *certainty* of punishment, by extinguishing all hope of pardon in the criminal, would lead him to connect the beginning of his repentance with the last words of his sentence of condemnation. To obtain this great and salutary end, there should exist *certain* portions of punishment, both in duration and degree, which should be placed by law beyond the power of the discretionary court before mentioned, to shorten or mitigate.

I have said nothing upon the manner of inflicting death as a punishment for crimes, because I consider it as an improper punishment for *any* crime. Even murder itself is propagated by the punishment of death for murder. Of this we have a remarkable proof in Italy. The duke of Tuscany soon after the publication of the marquis of Beccaria's excellent treatise upon this subject, abolished death as a punishment for murder. A gentleman, who resided five years at Pisa, informed me, that only five murders had been perpetrated in his dominions in twenty years. The same gentleman added, that after his residence in Tuscany, he spent three months in Rome, where death is still the punishment of murder, and where executions, according to Dr. Moore, are conducted with peculiar circumstances of public parade. During this short period, there were sixty murders committed in the precincts of that city. It is remarkable, the manners, principles, and religion, of the inhabitants of Tuscany and Rome, are exactly the same. The abolition of death alone, as a punishment for murder, produced this difference in the moral character of the two nations.

I suspect the attachment to death, as a punishment for murder, in minds otherwise enlightened, upon the subject of capital punishments, arises from a false interpretation of a passage contained in the old testament, and that is, "he that sheds the blood of man, by man shall his blood be shed." This has been supposed to imply that blood could only be expiated by blood. But I am disposed to believe, with a late commentator * upon this text of scripture, that it is rather a *prediction* than *a law*. The language of it is simply, that such will be the depravity and folly of man, that murder, in every age, shall beget murder. Laws, therefore, which inflict

* The reverend Mr. William Turner, in the second vol. of Memoirs of the Literary and Philosophical Society of Manchester.

death for murder, are, in my opinion, as unchristian as those which justify or tolerate revenge; for the obligations of christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon states.

The power over human life, is the sole prerogative of him who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer it to human hands.

If society can be secured from violence, by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation will be answered. In confinement, he may be reformed: and if this should prove impracticable, he may be restrained for a term of years, that will, probably, be coeval with his life.

There was a time, when the punishments of captives with death or servitude, and the indiscriminate destruction of peaceable husbandmen, women, and children, were thought to be essential to the success of war, and the safety of states. But experience has taught us, that this is not the case. And in proportion as humanity has triumphed over these maxims of false policy, wars have been less frequent and terrible, and nations have enjoyed longer intervals of internal tranquillity. The virtues are all parts of a circle. Whatever is humane, is wise—whatever is wise, is just—and whatever is wise, just, and humane, will be found to be the true interest of states, whether criminals or foreign enemies are the objects of their legislation.

A worthy prelate of the church of England once said upon seeing a criminal led to execution, "There goes my wicked self." Considering the vices to which the frailty of human nature exposes whole families of every rank and class in life, it becomes us, whenever we see a fellow creature led to public infamy and pain, to add further: "There goes my unhappy

father, my unhappy brother, or my unhappy son," and afterwards to ask ourselves, whether *private* punishments are not to be preferred to *public*.

For the honour of humanity it can be said, that in every age and country, there have been found persons in whom uncorrupted nature has triumphed over custom and law. Else, why do we hear of houses being abandoned near to places of public execution? Why do we see doors and windows shut on the days or hours of criminal exhibitions? Why do we hear of aid being secretly afforded to criminals to mitigate or elude the severity of their punishments? Why is the public executioner of the law an object of such general detestation? These things are latent struggles of reason, or rather the secret voice of God himself, speaking in the human heart, against the folly and cruelty of public punishment.

I shall conclude this inquiry by observing, that the same false religion and philosophy, which once kindled the fire on the alter of persecution, now doom the criminal to public ignominy and death. In proportion as the principles of philosophy and christianity are understood, they will agree in extinguishing the one, and destroying the other. If these principles continue to extend their influence upon government, as they have done for some years past, I cannot help entertaining a hope, that the time is not very distant, when the gallows, the pillory, the stocks, the whipping-post and the wheel-barrow, (the usual engines of public punishments) will be connected with the history of the rack and the stake, as marks of the barbarity of ages and countries, and as melancholy proofs of the feeble operation of reason and religion upon the human mind.

MEMOIRS

OF THE

LITERARY AND PHILOSOPHICAL SOCIETY

OF

MANCHESTER.

(Vol. II. p. 293.)

EXTRACT FROM AN ESSAY ON CRIMES AND PUNISHMENTS, BY THE REV. WILLIAM TURNER. READ MARCH 24, 1785.

1. As human punishments cannot rise beyond a certain height, if the severer ones begin to be inflicted too low in the scale of offences, the highest punishments will be brought into use long before we reach the highest offence; the necessary consequence of which must be, that crimes of different degrees of enormity will be punished equally. From hence it will as necessarily follow, that such crimes will be looked upon as indifferent with respect to each other. Habitual offenders are accustomed to estimate crimes by their consequences, and not by their moral turpitude; whenever, therefore, the civil magistrate makes no difference between the punishment, they will be apt to make as little difference between the commission of one, two, or more of them; according as it may suit their present convenience, or occasion less danger of detection *.

* Can there be a better reason given, why footpads more frequently accompany their depredations with cruelty, than highwaymen on horseback, than that, as they are more easily pursued, it is their business to render the sufferers incapable of pursuit.

Thus if both robbery and murder are punished equally, the highwayman will naturally argue with himself thus: "I shall be liable to the same punishment whether I rob this man, or whether I rob and murder him too; but if I rob him only, I leave an informer, who will endeavour to bring me to justice; my safest way, therefore, is to put an end to him at once, and so place an effectual bar to all information, at least from that quarter." This is the reason which Judge Blackstone assigns, though there may probably be others, why in France they seldom rob but they murder also; whereas in China, where murderers are only cut to pieces, they often rob, but never murder*. And he at the same time answers the question, "why does not this principle operate in England, as well as in other countries?" by shewing, that though the same punishment is provided both for robbery and murder, yet the robber has many chances of escaping, while the murderer is almost sure of having his sentence strictly executed; besides that, a difference is made, both in the expedition and solemnity of the execution, and in the subsequent disposal of the body.

2. Again, if the same punishment must serve for different crimes, and the highest punishment is an inadequate satisfaction for the highest crime, for many crimes it must be more than a satisfaction, and therefore, worse; that is, more detrimental to society than the crime itself. The laws of Draco, we are told, were made on a different principle; he conceived that the least offences merited death, and he could find no greater punishment for the highest. But however those divines may determine on this subject, who contend, that every sin, being an offence against an infinite being, is deserving of an infinite and eternal punishment, yet certainly no

* Comm. B. iv. c. 1. p. 18.

politician will admit this lawgiver's principle. And we need not wonder that his dreadful code, emphatically, but properly said to have been written in blood, was not suffered to continue long in force.

But this evil is of still greater consequence, as it leads to another of much more fatal tendency—for,

3. The too great severity of punishments hinders the execution of the laws, especially of those which have for their object crimes of a less atrocious nature. In this case *, either the party injured is induced to neglect a prosecution, rather than cause the delinquents to be so heavily punished; or if he be brought to a trial, the jury are led to violate their oath and perjure themselves to procure his acquittal: and if all this is not sufficient to save him, the Judge contrives to avail himself of some palliative circumstance which may justify a respite; so that it is a pretty certain fact, that of all the criminals convicted in England upon capital indictments, scarcely one in three really suffers the punishment appointed by the laws †.

Now it is wisely observed by one who well understood human nature ‡, and the observation is confirmed by constant experience, that crimes are more effectually prevented by the certainty, than by the severity of their punishment. For ‖ every

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* See the table of executions at the end of Howard on Prisons.

† Blackstone, B. iv. c. 1. p. 19.

‡ Beccaria, c. vii.

‖ Blackstone has expressed this sentiment so much better, that I cannot resist the temptation to copy his words.

Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in

offender, when he reflects upon the very small proportion of convicts that really suffer for their offences, naturally encourages himself with the reflection, "why should not I escape as well as others?" And if, contrary to his own expectations, and to general probability, the punishment should, in the end, fall upon him, he does not so much consider it as the just recompence of his crimes, as lament his misfortune, in being marked out as the victim of an unjust and unreasonably severe institution.

4. Further, the severity of punishment retards its execution, even in the case of those who actually suffer.

Nulla unquam de morte hominis cunctatio longa est, is a wise sentiment of the Poet* which may be extended to all severe institutions, and ought to have its due influence, as long as they continue in force; though if it were merely on this account, all such institutions stand greatly in need of a reform. For the minds of the common people cannot easily, at such a distance of time, connect the punishment with the action that has occasioned it, and are tempted to consider an execution, when it takes place long after the offence committed by the sufferer, rather in the light of a cruel and terrible exhibition, than as the just consequence of a particular violation of the laws of society †.

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some desperate attempt, to relieve his wants, or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn. Vol. iv. p. 19.

* Juvenal.

† Blackstone B. iv. c. 31. Vol. iv. p. 397.

These observations are intended to have a particular reference to capital punishments; which, however defended by some politicians, appear to have been opposed of late by all the most respectable writers on government*; and indeed are certainly in most cases, if not universally, absurd and impolitic.

Every wise and benevolent man will consider with himself, that as life is a blessing which he cannot give, so it behoves him carefully to examine his right to take it away. He will consider, that when mankind entered into society, they only gave up such a portion of their natural liberty, and submitted to only such a measure of restraint, as was essentially necessary to secure to its members the advantages of society: and therefore, that if this important end can be answered without having recourse to the punishment of death, there is no right belonging to the magistrate of inflicting such a punishment †. Now that, so far from being necessary to answer this end, capital punishments are exceedingly impolitic, and as far as they operate, tend frequently to prevent it, the observations already made on severe punishments, in general, might be sufficient to show.

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* Sir Thomas More, Grotius, Coke, Beccaria, Montesquieu, Blackstone, Voltaire.

† This seems to be a better argument than the excellent Marquis Beccaria's upon the subject, viz. "that no man has a right to take away his own life in a state of nature, and therefore cannot give up any such right to the Magistrate." (And considerations on Crim. Law, p. 186.) For admitting that no man has such a right, it must be observed, that his right over himself, in a state of nature is not what he gives up, but his right over others, when he enters into society. And it will bear a dispute, whether a man, entirely free from controul, has not a right to estimate his loss by an injury, at what value he pleases.

But to these we may add, further, that the use of capital punishments argues a want of capacity in the legislature. It is rather an expedient to get rid of certain inconveniences in society, than an attempt to remedy them. It is easy enough, indeed, for the magistrate to extirpate mankind, but it is his buisness to amend them, and make them happy. "It is quackery in government," says Blackstone, "to apply too frequently the same universal remedy, the *ultimum supplicium*—and that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence, he will not attempt to cure*."

The idea of capital punishments would naturally suggest itself in the infancy of a state. When any one had committed an offence, and disturbed the peace of society, the question would then first arise, "How shall we prevent these things?" And the answer most likely to occur to a set of barbarians would be, "Extirpate the offender, and give yourselves no further trouble about him †." But as civilization increased, it would soon be found a wiser method, to provide such expedients as might effectually induce the offender himself not to repeat his offence, deter others from its future commission, and at the same time, preserve an useful member to society. And though I will not undertake to determine universally, that in proportion as political governments have advanced to perfection, substitutes for capital

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* Blackstone, B. iv. c. 1. p. 17. 18.

† So the Hottentots have no fixed laws to direct them in the distribution of justice, and consequently, when any offence has been committed, there is no form of trial, or proportion of punishments to offences, but the Kraul (village) is called together, the delinquent is placed in the midst, and without further ceremony, demolished with their clubs, the chief striking the first blow.

punishments have been more frequently introduced *; yet I think it may be asserted with perfect safety, that government will never arrive at the perfection of which it is capable, till some very essential reform is obtained in our treatment of criminals.

And as frequent capital punishment is an argument of the want of a regular police, and a relict of barbarism in the constitution of any society, so its being still obstinately continued in use among us, tends to retain among the common people those barbarous manners, from which this kind of punishment originally took its rise, and to check the progress of that humanity of spirit, which, happily for mankind, has of late been making such rapid advances in our part of the

* Feudal times will furnish us with a striking exception. Every one will acknowledge the imperfection of this form of government; and yet, under it, almost all crimes were restrained, (or more properly licenced) by pecuniary mulcts: and few capital punishments were in use, except, most absurdly, for breaches of the forest law. The legislators of those days seem injudiciously to have followed, in regulating a society, of which they were properly the governors, the example of that cotemporary hierarchy, which succeeded in its attempts to persuade mankind, that it could controul the distribution of punishments under a constitution of government, of which its chief directors were likely to be ranked among the most unworthy members. As these held forth a regular bill of indemnity for sins, with prices proportioned to their enormity; so those published a similar list of prices for licences to commit crimes: and whereas, spiritually, you might blaspheme against the Almighty for a trifle; so politically, for a stated price, you might purchase the life of the king. A curious constitution, it must be confessed, where the supreme magistrate might be murdered with safety; but where it was death to shoot a partridge!

world. Let then the spirit of our punishments correspond with the spirit of the times, in order that we may sooner attain that perfection of universal charity, which ought to be the governing principle of the human mind.

Indeed the advocates for capital punishments seem now in general to be aware of the weakness of their ground, and at present seldom attempt to maintain it, except in cases of murder and high treason. Perhaps in the latter case it may sometimes be necessary: and in the former, scripture is brought in upon us, and requires, it is asserted, the rigorous infliction of death. Now with respect to the institutions of Moses, it is to be considered, that they were made for the regulation of a very peculiar people, for very particular purposes. Their whole civil constitution seems to have been admirably adapted to the progress then made in political advancement: but to have been at the same time so contrived, as to keep them where they were, till the opening of a more perfect dispensation. All, therefore, that we can fairly conclude from the instances of capital punishments, prescribed by the law of Moses, seems to be, that such punishments are not, in their own nature, absolutely and universally, unjustifiable; for the God of nature, we may be assured, would never contradict and overthrow the established laws of nature. But I can no more conceive that we are obliged, in this instance, to copy the Jewish code, than that we ought to have retained the law of retaliation*, or that we are wrong in not adopting the whole scheme, without alteration, reserve or addition.

But the punishment of murder by death, it is said, does not appear to have deduced its origin or obligation, from the law of Moses alone, but to have been required by the precept

* Ex. xxi. 24. Lev. xxiv. 20.

given to Noah and his posterity* ; "Whoso sheddeth man's blood, by man shall his blood be shed," and consequently to be obligatory upon all the descendants of that patriarch. I hope I shall not offend any one, by taking the liberty to put my own sense upon this celebrated passage; and to enquire, why it should be deemed a precept at all. To me, I must confess, it appears to contain nothing more than a declaration of what will generally happen; and in this view, to stand upon exactly the same ground with such passages as the following†: "He that leadeth into captivity shall go into captivity;"—"He that taketh up the sword shall perish by the sword." The form of expression is precisely the same in each of these texts; why then may they not be all interpreted in the same manner, and considered not as commands, but as denunciations? And if so, the magistrate will be no more bound by the text in Genesis, to punish murder with death, than he will, by the text in the Revelations, to sell every Guinea captain to our West India planters. And yet, however just and proper such a proceeding might be, I suppose no one will assert, that the magistrate is bound to it by either that or any other text in the scriptures; or that that alone would be admitted, as a sufficient reason for so extraordinary a measure ‡.

But in considering the punishment of murder by death, upon the footing of political advantage, which alone has any thing to do with the question, may it not justly be asked, what natural reason can be given, why the loss of one member

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* Gen ix. 6. † Rev. xv. 10. Mat. xxiv. 52.

‡ Let it also be observed, by those who will quote scripture upon the occasion, that when Cain murdered Abel, God only set a mark upon him; that is, rendered him infamous.—This is a scripture precedent!

of society should necessarily be followed by the loss of another ; and if none can be given, whether the present practice on such occasions, is any thing more, than a barbarous expedient to get rid of a difficulty, than hastily cutting a knot, because a little dexterity is requisite to untie it.

It would surely better become a wise politician to enquire, what are the springs which lead men to the commission of crimes ; and so to suit his punishments to particular offences, as that they shall in their own nature tend to prevent them, and correct their evil influence; and not to inflict random punishments, merely to make the delinquent suffer.

Now it will not be difficult to shew, that the principal springs of evil actions are, pride, luxury, and idleness, assisted by the influence of bad examples. To correct the ill effects of these things, we at present confine our prisoners in a state of absolute indolence, in the company of the most detestable of their species, who encourage, instead of shaming them, with free access to the means of intemperance, the gaoler being generally a publican, and after five or six months of this kind of discipline, we whip, banish, or hang them. In other words, we cherish, as much as we are able, those principles, and confirm, beyond the possibility of amendment, those habits which are the foundations of all vicious conduct; and then inflict upon them a momentary punishment, which, if they survive, they return into society prepared by ourselves to become its most detestable members; and if their punishment be the conclusion of their present existence, we have been doing them an injury which we cannot repair, by contriving for the last months of their lives such a course of conduct, as was sure to confirm their vicious principles and habits.

Is all this rational and wise? does it manifest sound judgment, or good policy? surely not : right reason would sug-

gest a very opposite proceeding. To counteract the effects of idleness and luxury, and prevent the influence of bad company, it would shew, that it was much more eligible to apply the punishments of shame, hard labour *, coarse diet, and solitary confinement; and these in different dégrees, according to the different enormity of the offences committed, and in proportion as they have arisen from one or another of these causes.

Many advantages seem likely to arise from this mode of punishment. That the certain infliction of hard labour would have more influence upon the mind of the offender, than the present bare probability of death, may naturally be supposed, and indeed has been frequently experienced. And the duration of the punishment would make a much deeper impression upon spectators, than the instantaneous execution of a criminal; and would therefore tend to deter more effectually from the commission of crimes in future. In suffering this kind of punishment also, the offender is compelled, in some degree at least, to support himself by his own labour, as long as he remains under confinement; he will also form habits of temperance and industry, and thus be prepared for usefulness in the world, when the term of his punishment is elapsed. And that the reformation of the offender will be very much promoted by some portion of solitary confinement (affording him opportunities of reflection, breaking him from the society of his old companions, &c.) has been sufficiently shewn by the excellent Mr. Howard, in his state of the prisons in Holland †.

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* Diodorus Siculus tells us, that Sabaco, king of Egypt, changed capital punishments, with much success, into stated kinds of labour.—Whose example Grotius recommends.

† See particularly his story of the shoemaker, who always drank the healths of his friends, the masters of the rasp-house, for teaching him sobriety and industry.

But the best method, where it can be done, of amending our penal code, is to take away all occasion for its severe institutions, by preventing, as much as possible, the crimes they restrain from being committed; or, in other words, by having recourse to such previous expedients*, as shall remove every prospect of advantage from their commission. Thus, while no other precautions were used to prevent the coining of gold, than making it a capital crime, the offence grew every day more frequent; but as soon as the late regulations respecting gold coin took place, which entirely precluded every prospect of advantage from this practice, the offence died away of itself; and we now scarcely ever (I believe I may say never) hear of a single offender in this respect.

These are the expedients which have hitherto been used in those countries, where attempts have been made to substitute other punishments in the room of capital ones, and otherwise to reform the penal institutions; and they have, I believe, been almost universally attended with success. The governments of China, Russia†, and Prussia, having been foremost in these experiments, while other, perhaps, more perfect states, have not pursued this laudible measure so far as might

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* Laws which only take effect *à posteriori*, and propose the prevention of crimes by cutting off the delinquent, will never reform; whereas prudent provisions to correct the morals, and proper punishments to counteract the principles of criminality, will have sure and lasting effects. Without such provisions, we may be making perpetual alterations, but shall in vain expect any salutary effects; we shall resemble those patients, who are always taking physic, but will not alter their bad diet, and intemperate modes of living. Crim. Law. p. xix.

† Grand instructions for forming a code for the Russian Empire, §. 210.

have been expected. Even in England this excellent work has not hitherto been entered upon with proper spirit. Our penal laws have too frequently been the work of a few, influenced by various improper passions, and not directed by that coolness which legislators ought always to possess. They have too often been made upon the spur of the occasion, as Lord Bacon expressed it; and when so made, their revisal has been afterwards neglected *; or we should not in the eighteenth century† have had reason to acknowledge with shame that stealing a swan ‡, breaking down a cherry tree §, letting out the water of a fish pond ‖, being seen in the company of gypsies ¶, with upwards of one hundred and fifty other actions which a man is daily liable to commit**; are declared by English acts of parliament, crimes worthy of instant death.

Is not this a fact at which Englishmen should blush? and ought not our legislators to undertake, without delay, the great but necessary work of reforming these sanguinary and impolitic statutes? Our country gloriously led the way in the abolition of torture; let us not be ashamed to follow the good

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* If Lord Ashburton really was engaged, as we were told, in the revisal, amendment, and digestion of our code of penal laws, his death is much to be lamented by every friend to humanity.

After this, will not any one acknowledge that Judge Foster, in the preface to his crown law, recommends its study with singular propriety, as a matter of universal concernment? "For," says he, "no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not, at some time or other, be deeply interested in it."

† Blackstone vol. iv. p. 4.

‡ Dal. Just. c. clvi. § 31st. Geo. 2. c. xlii. ‖ 9th Geo. 1. c. xxii.

¶ 5th. Eliz. c. xx. ** Ruffhead's Index to Statutes.

example which others have set us in return, and still further harmonize our civil institutions. We shall then have performed a work for which posterity will regard us with gratitude: and our age will then stand a chance of still acquiring the same reputation for humanity and public spirit, which it justly owes to the encouragement it affords to improvements in the arts and sciences.

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